

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [REDACTED] 1923

No. ~~865~~ 226

ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

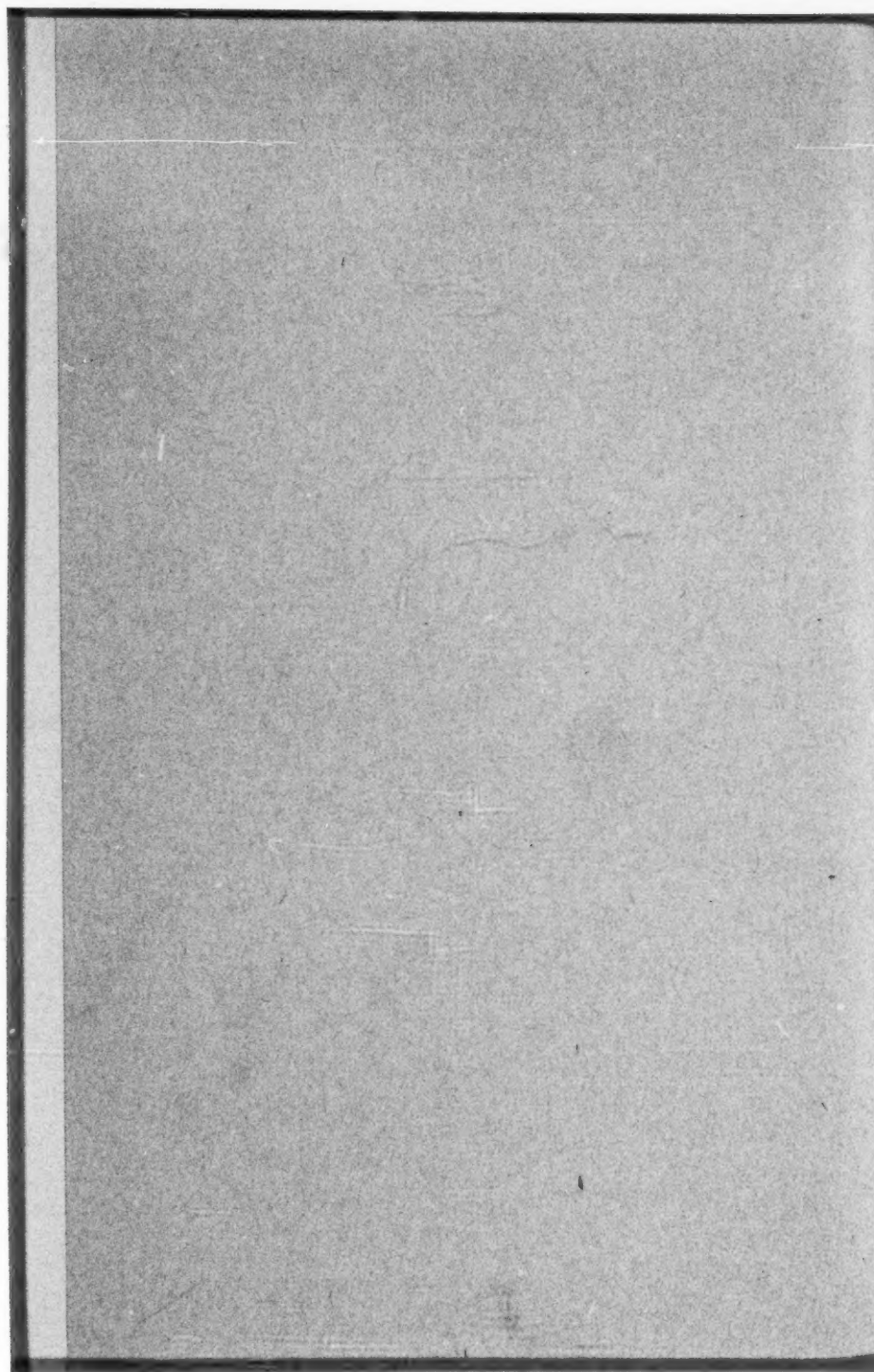
W. W. DARDEN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE ~~EIGHTH~~ CIRCUIT.

Seventh

FILED FEBRUARY 20, 1923.

(29,415)



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 865.

ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

W. W. DARDEN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE ~~SEVENTH~~ *SEVENTH* CIRCUIT.

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1 In the District Court of the U. S., Middle District of Tennessee, Nashville Division.

No. 1171. Law.

W. W. DARDEN

vs.

ADAMS EXPRESS COMPANY.

TRANSCRIPT OF RECORD.

DECLARATION.

[Filed Sept. 9, 1915.]

Plaintiff, W. W. Darden, a citizen and resident of Tennessee, sues defendants Adams Express Company, a corporation chartered under the laws of the State of New York, and a citizen of the State of New York, having an office located and an agent resident at Nashville in the Middle District of Tennessee; and defendant The Pennsylvania Railroad Company, a corporation chartered under the laws of the State of Pennsylvania, and a citizen of said State, but which has an office located and an agent resident at Nashville in the Middle District of Tennessee, for Sixty-five thousand dollars (\$65,000) damages, and for cause of action states and shows the following:

Defendant Adams Express Company, a citizen and resident of the State of New York as aforesaid, is an express company which, as a common carrier for hire, makes contracts for the shipment and transportation by it, and ships property through many states of the United States; and defendant The Pennsylvania Railroad Company, a citizen and resident of the State of Pennsylvania as aforesaid, as a common carrier of freight and passengers for hire, owns and operates a steam commercial railroad between, into and through several states of the United States; and both de-

2 defendants Adams Express Company and the Pennsylvania Railroad Company, on July 7, 1915, and for a long time prior thereto, were common carriers, railroads or transportation companies subject to the provisions of an Act of the Congress of the United States of America entitled "An Act to Regulate Commerce," passed February 4, 1887, and other Acts of said Congress amendatory thereof, and particularly an Act passed March 4, 1915.

On July 5, 1915, at Latonia, Kentucky, plaintiff had a contract which had been made some days, to-wit: about ten days prior to that time, with the defendant Adams Express Company by which said defendant as a common carrier for hire, agreed to ship and transport for plaintiff six valuable horses and three men to attend

the same in transit, and other items of property, from Latonia in the State of Kentucky in the United States, to a point in an adjacent foreign country, to-wit: to Windsor, in the province of Ontario, in the Dominion of Canada; and said defendant Adams Express Company, at said time and place, as a common carrier for hire, agreed to furnish and provide for said shipment a first class, two-door, steel express or palace horse car, and to stall off the same as directed by plaintiff, namely with six stalls in the plaintiff's half of said car (the other half of said car being intended for the use of horses belonging to other persons with whom defendant Adams Express Company would make a contract for transportation or shipment); and agreed to route said shipment via the Cincinnati, Hamilton & Dayton Railway, or the Cleveland, Cincinnati, Chicago and St. Louis Railway, known as the Big Four, which were the natural, direct and expeditious routes by which to send said horses from Latonia, Ky., to Windsor, Canada; and said defendant Adams Express Company, at the time, promised to furnish this car and send said shipment forward on July 6, 1915; and for many reasons plaintiff was anxious that this be done; and on the morning of July 6, 1915, plaintiff saw the agent and representative of defendant Adams Express Company at Latonia, one D. W. Fenfrock, and upon explaining to said agent the importance of said shipment going forward promptly, as promised, said agent informed the plaintiff that he would go up into the yards and see if he could not get a car to send the shipment forward on that evening; but after being gone about an hour, said agent returned and informed the plaintiff that he could not furnish a good car for the sending forward of the shipment on that day, but that he could and would furnish a car as contracted for, and send the same forward on the next day, which was July 7, 1915.

At that time there was in the yards, and available to use for said shipment, the same old, worn, rotten and defective wooden car which defendants upon the following day, actually undertook to use in making said shipment, with the result hereinafter fully described. Plaintiff, on July 6, 1915, when he talked with the agent of defendant Adams Express Company, made known to said agent of said defendant the names of the men who would travel in said car to look after and attend said horses in transit, for plaintiff to-wit: Lowden, Jones, and Easley, and said agent wrote said names down in his note book at the time they were furnished to him.

Said defendant knew that plaintiff was intending to leave Latonia on the evening of July 6, 1915, for Nashville, Tennessee, and this the plaintiff did, with the distinct understanding with the said Adams Express Company that the first class express or palace horse car would be furnished for the shipment of said property, horses and attendants, stalled off and routed as aforesaid, and the said agent of the said defendant Adams Express Company contracted and agreed on behalf of said company that he personally would see to the details of said contract and understanding being carefully attended to and performed by said Company,—the said defendant Adams Express Company, through its said agent, having

been informed, and thoroughly understanding the very great value of the horses of plaintiff, for the shipment of which said contract and understanding had been made. The charge of the said defendant Adams Express Company for furnishing said car and making the shipment and performing the agreement and contract aforesaid, was Eighty-two 50/100 dollars (\$82.50), and this charge and consideration was paid to said defendant company by the plaintiff before it sent said shipment forward in the way and manner hereinafter fully described.

Plaintiff left Latonia, Ky., on the evening of July 6, 1915, relying upon the aforesaid promise, contract and agreement of the said defendant Adams Express Company with reference to the furnishing of said car and the shipment of said horses, property and attendants; and on the following day, to-wit: July 7, 1915, and after plaintiff had left Latonia as aforesaid, said defendant Adams

4 Express Company, in violation of its said contract and understanding with the plaintiff, and unlawfully, wrongfully and negligently, furnished and had plaintiff's horses and property loaded into, an old, rotten and defective wooden car, which was the same car that said defendant company and its agent did not have the temerity to offer to plaintiff the preceding day when plaintiff was personally present at Latonia and after furnishing said old wooden car, and having plaintiff's horses and property and attendants of said horses, and other horses belonging to other persons, loaded therein, said defendant Adams Express Company, in violation of said contract, and unlawfully, wrongfully and negligently, turned said car over to, and routed and shipped the same on towards Windsor, Canada, via the lines of the defendant, The Pennsylvania Railroad Company; and over the lines of the last named defendant company said old wooden car containing, among horses and attendants of other persons, the six horses and property and attendants of the plaintiff, left Cincinnati, Ohio, in a train of the defendant Pennsylvania Railroad Company, on the night of July 7, 1915; and this train, on said night, had proceeded only a short distance, to-wit, about fourteen miles, from Cincinnati over the line of the Pennsylvania Railroad Company (Cincinnati, Ohio, being immediately across the Ohio river from Latonia, Kentucky,) when said old, defective, worn and rotten wooden car wrecked, and in addition to killing other horses belonging to other parties, and the attendants of such horses, the most valuable five of plaintiff's six horses in said old wooden car were fatally injured and killed, and the attendant Easley was killed, and the attendants Jones and Lowden were badly injured.

Plaintiff avers that the old wooden car in which said horses, property and attendants were being moved and transported by defendants at the time of said wreck, and which had been furnished and provided by defendant Adams Express Company in violation of said contract, and unlawfully, wrongfully and negligently, was ancient, antiquated, rotten, worn, weak and defective in its lateral and upright wooden beams, braces, holdings, supports and parts, and its iron bolts, braces, holdings, supports and parts were gener-

ally old, worn, weak, rotten and defective in all of its parts and appliances, so that the same was incapable of safely and securely holding together in transit, while loading and handled as the same was loaded and handled by defendants; and all these things

5 were known to defendants Adams Express Company and The Pennsylvania Railroad Company, or could have been known to them in the exercise of due and proper care upon their part, and were unknown to plaintiff, and could not have been ascertained by him in the exercise of due and proper care upon his part.

And defendant The Pennsylvania Railroad Company, for itself and as the agent of defendant Adams Express Company, received said defective car containing said horses, property and attendants, from defendant Adams Express Company, and unlawfully, wrongfully and negligently placed said defective car in a long and heavy train, cars in which were heavy steel cars; and unlawfully, wrongfully and negligently, and contrary to the usages and practices of good and safe railroading, placed said car at the front or head end of said train, with a long and heavy train coupled behind the same, and with a large and heavy locomotive to the front of the same, for the purpose of drawing said heavy train,—thus and thereby unlawfully, wrongfully and negligently, and unnecessarily, for itself and as the agent of defendant Adams Express Company, putting and placing an undue strain upon the said defective car when the same was undertaken to be drawn in the train and over the line of the said defendant railroad company running from Cincinnati, Ohio, via Columbus, Ohio, and other intermediate points, on its journey towards Windsor, Canada, and particularly placing such undue and unnecessary stress and strain upon said defective car when the same was drawn in said train up a grade (as defendants knew the same would have to be drawn at many places when moved over said railroad line) at the contemplated, required and scheduled speed of the train in which said defective car was moved.

On the night of July 7, 1915, said heavy train with said defective car at the head or front part thereof, proceeded over said railroad line from Cincinnati, Ohio, on its way via Columbus, Ohio, to Windsor, Canada; and at a point where said defendant railroad company was maintaining double tracks, and while running on the southern one of said tracks, and traveling in a general eastward or northeastward direction, about 14 miles out of Cincinnati, Ohio, and about 107 miles from Columbus, Ohio, and near mile post "C 107," and a short distance, to wit: about 200 or 300 feet or more west of the corporation line of Terrace Park, and a short distance, to wit:

6 about 500 feet or more west of Robinson Station, and while said train was running up grade, and at a high rate of speed,—said old, rotten and defective car, in its wooden and iron braces, supports, holdings and parts, and by reason of its inherent defects and condition, and the way and manner it was then and there being handled by defendants, broke and pulled in two and apart, and was wrecked, and the box and body part of said car, or parts thereof, became and were derailed and wrecked, and after

being drawn a short distance in its wrecked condition, rolled or was thrown and hurled off the track upon which the car had been running, over the northern adjoining parallel track, and said car was crushed and came apart and to pieces, and the same or parts thereof went over and down the side of an embankment or fill about 15 feet high on which said railroad tracks were constructed at that point; and the wrecking and derailment and demolition of said car at said place was done with so much force and violence that four of plaintiff's said horses were almost instantly killed, and died at the scene of said wreck from the injuries they received in said wreck, and a fifth one of plaintiff's said horses was so badly injured that she died on the morning of July 10, 1915, after having been removed to Cincinnati, Ohio, and one of the attendants of plaintiff's horses was killed and the other two were injured as hereinbefore stated, and various small items of property belonging to plaintiff, consisting of saddles, bridles, boots, shoes, blankets, and other paraphernalia and equipment, of relatively small value, to wit: about the value of \$250, were lost, demolished and destroyed.

The five horses belonging to plaintiff which were fatally injured and killed in said wreck were very valuable horses indeed, though of different relative values, and were high class thoroughbred race horses, with splendid pedigrees, and some of them with excellent past racing performance to their credit, and all of them were of great future promise and then present value.

These five horses, so fatally injured and killed, were of the following names, ages and values, to wit:

"Dortch," aged 3 years, of the value of about \$30,000;

"Little Father," aged 7 years, of the value of about \$15,000;

"Margaret D," aged 3 years, of the value of about \$4,500;

"Red Coat," aged 2 years, of the value of about \$8,500;

"Green Horn," aged 6 years, of the value of about \$2,000.

7 Plaintiff avers that all of the aforesaid wrongs and injuries to him, and all of the aforesaid destruction of and damages to his property, were proximately caused by the unlawful, wrongful and negligent conduct of defendants hereinbefore set out and described, and were in no way due to any fault or wrong of the plaintiff.

Defendants though liable refuse to pay, and therefore plaintiff sues the defendants for \$65,000, and demands a jury to try this cause. Pitts & McConnico, Attorneys for Plaintiff.

8 **PLEAS OF DEFENDANT.**

[Filed Sept. 28, 1915.]

In U. S. District Court.

I.

This defendant for plea says that it is not guilty of the matters and things as the plaintiff hath in his declaration averred.

II.

This defendant for further plea says that since before June 29, 1906, and continuously to the present time, it has been an express company engaged in interstate commerce and as such is and has been subject to the provisions of an Act of Congress to regulate commerce approved February 4, 1887, and amendments thereto. That from time to time and especially on May 31, 1915 and various dates theretofore this defendant has filed with the Interstate Commerce Commission its regulations and schedule or tariff of rates, and the same have together with all other tariffs promulgated and filed with the Interstate Commerce Commission been printed and posted and kept open to public inspection, all as required by said Act. That said regulations and schedules show the rates to be charged for the transportation of property from different points in the different states, and also between points in the United States and Windsor, Canada. Said regulations and schedules show that defendant's rates and charges are based upon the value of the property to be carried and were, and are graduated reasonably according to such value, and that it had a contract, with the plaintiff of date July 7, 1915, by and under the terms of which said property mentioned in the declaration was to be transported from Covington, Kentucky, to Windsor, Canada, the rate being based upon the valuation of the property, and the value of said six horses mentioned in the declaration was stated by plaintiff to be One Hundred (\$100.00) Dollars each, and upon this statement of the value of said horses the rate and charge for transportation was fixed and determined in accordance with the form of contract and the tariff or schedule of rates so filed with the Interstate Commerce Commission and published as required by law. That this defendant did not know, and could not ascertain the value of said horses to be shipped and transported, and this defendant relied upon the statements and representations of the plaintiff with respect to the value of said horses and accordingly applied and charged the rates fixed by said published schedule of rates.

Wherefore defendant says that the plaintiff cannot in any event recover of this defendant more than the sum of Five Hundred (\$500.00) Dollars for the loss or destruction of said horses, and is estopped to deny that the value was in excess of One Hundred (\$100.00) Dollars each.

Wherefore, etc. Maxwell & Ramsey, W. L. Granbery, Attorneys for Defendant.

AMENDED DECLARATION.

[Filed Dec. 8, 1915.]

In U. S. District Court.

Plaintiff, W. W. Darden, a citizen and resident of Tennessee, sues the defendant Adams Express Company, a corporation chartered

under the laws of the State of New York, and a citizen of the State of New York, having an office located and an agent resident at Nashville in the Middle District of Tennessee; defendant The Pennsylvania Railroad Company, a corporation chartered under the laws of the State of Pennsylvania, and a citizen of said State, having an office located and an agent resident at Nashville, in the Middle District of Tennessee, and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company a corporation chartered under the laws of the State of Pennsylvania, and a citizen of said State, having an office located and an agent resident at Nashville in the Middle District of Tennessee, for Sixty-five thousand dollars (\$65,000) damages, and for cause of action states and shows the following:

Defendant Adams Express Company, a citizen and resident of the State of New York, as aforesaid, is an express company which, as a common carrier for hire, makes contracts for the shipment
10 and transportation by it property, and ships property through many States of the United States; and defendants The Pennsylvania Railroad Company, and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, citizens of the State of Pennsylvania as aforesaid, as common carriers of freight and passengers for hire, own and operate steam commercial railroads running between, into and through several states of the United States, and all three of said defendants, on July 7, 1915, and for a long time prior thereto, were common carriers, railroads or transportation companies, subject to the provisions of an Act of Congress of the United States of America entitled "An Act to Regulate Commerce," passed February 4, 1887, and other Acts of said Congress amendatory thereof, and particularly an Act passed March 4, 1915.

On July 5, 1915, at Latonia, Kentucky, plaintiff had a contract which had been made some days, to wit: about ten days prior to that time, with the defendant Adams Express Company by which said defendant as a common carrier for hire, agreed to ship and transport for plaintiff six valuable race horses and three men to attend the same in transit, and other items of property, from Latonia in the State of Kentucky in the United States to a point in an adjacent foreign country, to wit: to Windsor, in the Province of Ontario, in the Dominion of Canada; and said defendant Adams Express Company, at said time and place, as a common carrier for hire, agreed to furnish and provide for said shipment a first class, two-door, steel express or palace horse car, and to stall off the same as directed by plaintiff, namely with six stalls in the plaintiffs half of said car (the other half of said car being intended for the use of horses belonging to other persons with whom defendant Adams Express Company would make a contract for transportation of shipment); and agreed to route said shipment via the Cincinnati, Hamilton & Dayton Railway or the Cleveland, Cincinnati, Chicago and St. Louis Railway, known as the Big Four, which were the natural, direct and expeditious routes by which to send said horses from Latonia, Kentucky to Windsor, Canada; and said defendant Adams Express Company, at the time, promised to furnish this car

and send said shipment forward on July 6, 1915; and for many reasons plaintiff was anxious that this be done; and on the morning of July 6, 1915, plaintiff saw the agent and representative of defendant Adams Express Company at Latonia, one D. W. Fennock, and upon explaining to said agent the importance of said shipment going forward promptly, as promised, said agent informed the plaintiff that he would go up into the yards and see if he could not get a car to send the shipment forward on that evening; but after being gone about an hour, said agent returned and informed the plaintiff that he could not furnish a good car for the sending forward of the shipment on that day, but that he could and would furnish a car as contracted for, and send the same forward on the next day, which was July 7, 1915.

At that time there was in the yards, and available to use for said shipment, the same old, worn, rotten and defective wooden car which defendants upon the following day, actually undertook to use in making said shipment, with the result hereinafter fully described. Plaintiff, on July 6, 1915, when he talked with the agent of the defendant Adams Express Company, made known to said agent of said defendant the names of the men who would travel in said car to look after and attend said horses in transit, for plaintiff, to-wit: Lowden, Jones and Easley, and said agent wrote said names down in his note book at the time they were furnished to him.

Said defendant knew that plaintiff was intending to leave Latonia on the evening of July 6, 1915, for Nashville, Tennessee, and this the plaintiff did, with the distinct understanding with the said Adams Express Company that the first class express or palace horse car would be furnished for the shipment of said property, horses and attendants, stalled off and routed as aforesaid, and the said agent of the said defendant Adams Express Company contracted and agreed on behalf of said company that he personally would see to the details of said contract and understanding be carefully attended to and performed by said Company—the said Adams Express Company through its said agent, having been informed and thoroughly understanding the very great value of the horses of plaintiff for the shipment of which said contract and understanding had been made. The charge of the said defendant Adams Express Company for furnishing said car and making the shipment and performing the agreement and contract aforesaid, was Eighty-two 50/100 dollars (\$82.50), and this charge and consideration was paid to said defendant company by the plaintiff before it sent said shipment forward in the way and manner hereinafter fully described.

Plaintiff left Latonia, Ky., on the evening of July 6, 1915, relying upon the aforesaid promise, contract and agreement of the said defendant Adams Express Company with reference to the furnishing of said car and the shipment of said horses, property and attendants; and on the following day, to-wit, July 7, 1915, and after plaintiff had left Latonia as aforesaid, said defendant Adams Express Company, in violation of its said contract and understanding with the plaintiff, and unlawfully, wrongfully and negligently, had plaintiff's horses and property loaded into an old,

worn, rotten and defective wooden car, which was the property of defendant, and which was the same car that said defendant express company and its agent did not have the temerity to offer to plaintiff the preceding day when plaintiff was personally present at Latonia; and after furnishing said old wooden car, and having plaintiff's horses and property and attendants of said horses, and other horses belonging to other persons, loaded therein, said defendant Adams Express Company, in violation of said contract, and unlawfully, wrongfully and negligently, turned said car over to, and routed and shipped the same on towards Windsor, Canada, via the lines of the defendant railroads companies; and said old wooden car containing, among horses and attendants of other persons, the six horses and property and attendants of the plaintiff, left Cincinnati, Ohio, in a train of the defendant railroad companies on the night of July 7, 1915; and this train, on said night, had proceeded only a short distance, to-wit, about fourteen miles, from Cincinnati, over the line of defendant railroad companies (Cincinnati, Ohio, being immediately across the Ohio River from Latonia, Kentucky,) when said old, defective, worn and rotten wooden car wrecked, and in addition to killing other horses belonging to other parties, and the attendants of such horses, the most valuable five of plaintiff's six horses in said old wooden car, were fatally injured and killed, and the attendant Easley was killed, and the attendants Jones and Lowden were badly injured.

Plaintiff avers that the old wooden car, in which said horses, property and attendants were being moved and transported by defendant at the time of said wreck, was ancient, antiquated, rotten, worn, weak and defective in its lateral and upright wooden beams, braces, hold-ings, supports and parts, and in its iron bolts, braces, holdings, supports and parts, and was generally old, worn, weak, rotten and defective in all of its parts and appliances, so that the same was incapable of safely and securely holding together in transit, while loaded and handled as the same was loaded and handled by defendants; and all these things were known to defendants, or could have been known to them in the exercises of due and proper care upon their part, and were unknown to plaintiff, and could not have been ascertained by him in the exercise of due and proper care upon his part, and were in violation of the aforesaid understanding and contract with defendant Adams Express Company.

And defendant railroad companies, for themselves and as agents of defendants Adams Express Company, furnished said defective car containing said horses, property and attendants, and received the same from defendant Adams Express Company, and unlawfully, wrongfully and negligently placed said defective car in a long and heavy train, many if not all the other cars in which were heavy steel cars; and unlawfully, wrongfully and negligently, and contrary to the usages and practices of good and safe railroading, placed said car at the front end or head end of said train, with a long and heavy train coupled behind the same, and with a large and heavy locomotive.

tive coupled to the front of the same, for the purpose of drawing said heavy train,—thus and thereby unlawfully, wrongfully and negligently, and unnecessarily, for themselves and as agents of defendant Adams Express Company, putting and placing an undue strain upon said defective car when the same was undertaken to be drawn in the train and over the lines of the said defendant railroad companies running from Cincinnati, Ohio, via Columbus, Ohio, and other intermediate points, on its journey towards Windsor, Canada, and particularly placing such undue and unnecessary stress and strain upon said defective car when the same was drawn in said train up a grade (as defendants knew the same would have to be drawn at many places when moved over said railroad lines), at the contemplated, required and scheduled speed of the train in which said defective car was moved.

On the night of July 7, 1915, said train with said defective car at the head or front part thereof, proceeded over said railroad lines from Cincinnati, Ohio, on its way via Columbus, Ohio, to Windsor, Canada; and at a point where said defendant railroad companies were maintaining double tracks, and while running on the southern one of said tracks, and traveling in a general eastward or northeastward direction, about 14 miles out of Cincinnati, Ohio, and about 107 miles from Columbus, Ohio, and near mile post "C 107," and

14 a short distance, to-wit: about 200 or 300 feet or more west of the corporation line of Terrace Park, and a short distance, to-wit, about 500 feet or more west of Robinson Station, and while said train was running up grade, and at a high rate of speed,—said old, rotten and defective car, in its wooden and iron braces, supports, holdings and parts, and by reason of its inherent defects and condition, and the way and manner it was then and there being handled by defendants broke and pulled in two and apart, and was wrecked, and the box and body part of said car, and other parts thereof, became and were derailed and wrecked, and after being drawn a short distance in its wrecked condition, the box and body part thereof rolled or was thrown and hurled off the track upon which the car had been running, over the northern adjoining parallel track, and said car was crushed and came apart and to pieces, and the same or parts thereof went over and down the side of an embankment or fill about 15 feet high on which said railroad tracks were constructed at that point; and the wrecking and derailment and demolition of said car at said place was done with so much force and violence that four of plaintiff's said horses were almost instantly killed, and died at the scene of said wreck from the injuries they received in said wreck, and a fifth one of plaintiff's said horses was so badly injured that she died on the morning of July 10, 1915, after having been removed to Cincinnati, Ohio; and one of the attendants of plaintiff's horses was killed and the other two were injured as hereinbefore stated, and various small items of property belonging to plaintiff, consisting of saddles, bridles, boots, shoes, blankets, and other paraphernalia and equipment, of relatively small value, to-wit, about the value of \$250, were lost, demolished and destroyed.

The five horses belonging to plaintiff which were fatally injured and killed in said wreck were very valuable horses indeed, though of different relative values, and were high class thoroughbred race horses, with splended pedigrees, and some of them with excellent past racing performances to their credit, and all of them were of great future promise and then present value.

These five horses, so fatally injured and killed, were of the following names, ages and values, to-wit:

"Dortch," aged 3 years, of the value of about \$30,000;

"Little Father," aged 7 years, of the value of about \$15,000;

"Margaret D," aged 3 years, of the value of about \$4,500;

15 "Red Coat," aged 2 years, of the value of about \$8,500;

"Green Horn," aged 6 years, of the value of about \$2,000.

Plaintiff avers that all of the aforesaid wrongs and injuries to him, and all of the aforesaid destruction of and damages to his property, were proximately caused by the unlawful, wrongful and negligent conduct of defendants hereinbefore set out and described, and were in no way due to any fault or wrong of the plaintiff.

Defendants though liable refuse to pay, and therefore plaintiff sues the defendants for \$65,000 and demands a jury to try this cause. Pitts & McConnico, Attorneys for Plaintiff.

In U. S. District Court.

THIRD PLEA.

Filed April 26, 1916.

Defendant Adams Express Company, for a third plea says that it did not contract with the plaintiff as he hath in his declaration averred.

Wherefore, etc. Maxwell & Ramsey, Jos. S. Graydon, W. L. Granbery, Attorneys.

O. K.—Pitts & McConnico, Attorneys for Plaintiff.

16 REPLICATION TO THE PLEA OF DEFENDANT.

(Filed April 12, 1916.)

In U. S. District Court.

I.

Plaintiff W. W. Darden for replication to the plea of not guilty in this cause by defendant Adams Express Company joins issue on said plea.

II.

Plaintiff W. W. Darden for replication to the second plea filed in this cause by defendant Adams Express Company says that all matters and things averred and stated in said second plea are untrue

and are hereby denied; and plaintiff accordingly joins issue with the said defendant upon said second plea. Pitts & McConnico, Attorneys for Plaintiff.

ORDER NON-SUITING AS TO RAILROAD COMPANIES.

(Entered May 3, 1916.)

In U. S. District Court.

(Edward T. Sanford, Judge.)

Came again the parties in proper person and by attorneys and came also the Jury heretofore impaneled in the cause;

Thereupon the plaintiff asks leave of the court to be allowed to take a non-suit herein as to the defendants Railroad Companies, which motion is by the court allowed and the suit is dismissed as to the said Railroad Companies, at the costs of the plaintiff.

**17 MEMORANDUM OPINION ON DEFENDANT'S MOTION
FOR NEW TRIAL.**

(Filed September 30, 1916.)

In U. S. District Court.

(Edward T. Sanford, Judge.)

1. The plaintiff's case, by the allegations in the declaration, is based on the underlying charge that the car in which his horses were being carried, by reason of its defective and unsafe condition, broke and pulled in two and apart and became derailed and wrecked, and after being drawn a short distance in its wrecked condition was thrown from the side of the track; and it was further insisted that even if the defective condition of the car is not shown to have been the sole cause of its derailment, that if such defective condition contributed to the derailment, the defendant is also liable. The defendant, on the other hand, insisted that the derailment of the car resulting in the death of the defendant's horses were caused solely by a violent windstorm blowing the car over on its side, and that the condition of the car itself did not in any way contribute to its derailment. It is undisputed that the storm in question was of such character as to be termed an act of God, and that if it was the sole cause of the derailment there could be no recovery. Under the charge to the jury they were warranted in returning a verdict in favor of the plaintiff, unless the defendant established the defense that the derailment was caused solely by the wind storm, and to return a verdict in favor of the plaintiff if they found that a defective condition of the car either caused it to break in two, and become derailed, as alleged, or contributed to its derailment.

There was a great amount of evidence introduced at the trial, bearing upon the issues in controversy, to which, during the progress of the trial, I gave close attention and careful consideration. I have since had the benefit of strong and forcible arguments on both sides, on the defendant's motion for a new trial, and of a consideration of the elaborate and helpful briefs filed by counsel. Reviewing the evidence at great length. A careful consideration of all this evidence has led me to the conclusion, in view of all the physical facts surrounding this accident, as disclosed by the testimony, that it appears from the clear and manifest weight of the evidence that

18 the derailment of this car was caused by the windstorm and not by such defects, as may have existed in the condition of the car, and that, under the clear weight of the evidence, no defect in the car appears to have contributed to its derailment. This being true, I am constrained to conclude, without setting forth the various evidential facts which lead me to this conclusion, that the verdict rendered in favor of the plaintiff is contrary to the clear and manifest weight of the evidence, and that, especially as this is the first verdict in the case, it should now be set aside on that ground, under the rules laid down in *Mt. Adams Railway Company vs. Lowery* (6th Circ.) 74 Fed. 653, 672, and *Felton vs. Spiro* (6th Circ.) 78 Fed. 576, 682.

2. Without, therefore, passing upon the other grounds of the motion for a new trial, an order will be entered sustaining the grounds of the motion that the verdict is against the evidence and the weight of the evidence, and setting aside the verdict and granting the defendant a new trial accordingly. Sanford, Judge.

ORDER GRANTING NEW TRIAL.

(Entered October 5, 1916.)

In U. S. District Court.

(Edward T. Sanford, Judge.)

This cause came on to be heard on the defendant's motion for new trial, and having been argued by counsel and considered by the court, and the court having handed down its written opinion thereon, it is, in accordance therewith, ordered, considered and adjudged that the motion for new trial, in so far as based upon the ground that the verdict is against the evidence and the weight of the evidence, be, and hereby is, granted, and that the verdict heretofore rendered in this cause be, and hereby is, set aside, and that the defendant be, and hereby is, awarded a new trial.

Approved for entry. Sanford, Judge.

VERDICT FOR PLAINTIFF.

(Entered November 12, 1921.)

In U. S. District Court.

(Edward T. Sanford, Judge.)

Came again the parties in proper person and by attorneys, and came also the jury heretofore empanelled in the cause and who after further consideration of the cause, upon their oaths do say, that they find the issues in favor of the plaintiff, W. W. Darden and against the defendant, Adams Express Company, and assess the damages of the plaintiff at Thirty-two Thousand Five Hundred (\$32,500) Dollars.

Thereupon, on motion of the defendant, they are allowed until December 5, 1921, in which to file a motion for a new trial.

ORDER—JUDGMENT FOR PLAINTIFF.

(Entered Nov. 12, 1921.)

(Edward T. Sanford, Judge.)

In U. S. District Court.

This cause came on to be further heard at this term on the motion of the defendant Adams Express Company for a new trial; and upon consideration thereof and in accordance with the written opinion handed down by the court thereon, it is considered and ordered by the court that said motion be and is over-ruled. And the jury by whom the issues joined in this case was tried having on November 12, 1921, returned a verdict in favor of the plaintiff and against the said defendant and assessed the plaintiff's damages at \$32,500.00, it is therefore further considered and adjudged by the court that the plaintiff W. W. Darden have and recover of the defendant Adams Express Company the amount of said verdict with interest from the date of its rendition, aggregating the sum of Thirty-two
20 Thousand Six Hundred and Ninety-five Dollars (\$32,695.00) together with all costs herein secured and not previously adjudged; for the collection of which execution is awarded.

(Approved for entry.) Sanford, Judge.

ORDER DENYING MOTION FOR NEW TRIAL.

(Entered December 19, 1921.)

In U. S. District Court.

(Edward T. Sanford, District Judge.)

This cause came on to be further heard at this term on the motion of the defendant Adams Express Company for a new trial; and upon consideration thereof and in accordance with the written opinion handed down by the court thereon, it is considered and ordered by the court that said motion be and is over-ruled. And the jury by whom the issues joined in this case was tried having on November 12, 1921, returned a verdict in favor of the plaintiff and against the said defendant and assessed the plaintiff's damages at \$32,500.00, it is therefore further considered and adjudged by the court that the plaintiff W. W. Darden have and recover of the defendant Adams Express Company, the amount of said verdict with interest from the date of its rendition, aggregating the sum of Thirty-two Thousand Six Hundred and Ninety-five Dollars (\$32,695.00) together with all costs herein accrued and not previously adjudged; for the collection of which execution is awarded.

(Approved for entry.) Sanford, Judge.

21 **MEMORANDUM OPINION ON DEFENDANT'S MOTION
FOR NEW TRIAL.**

(Filed December 19, 1921.)

In U. S. District Court.

(Edward T. Sanford, District Judge.)

The motion for new trial relates solely to the action of the court in denying certain motions of the defendant Express Company made at the conclusion of the plaintiff's testimony and at the conclusion of all the evidence. I find no reason for changing the conclusions reached, which were arrived at after hearing full and forceful argument and careful consideration thereof.

The motion will accordingly be denied.

BOND AND SURETY.

(Filed March 7, 1922.)

In U. S. District Court.

Know all men by these presents, that we Adams Express Company, as principal, and National Surety Company, as surety, are held and firmly bound unto W. W. Darden, in the full and just sum of Thirty-

six Thousand (\$36,000) Dollars, to be paid to the said W. W. Darden, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, representatives and assigns, jointly and severally by these presents.

Executed and dated this 7th day of March, in the year one thousand nine hundred and twenty-two.

Whereas, lately, at a term of the District Court of the United States for the Middle Division of the Middle District of Tennessee, in a suit pending in said court between W. W. Darden, as plaintiff, and Adams Express Company, as defendant, a judgment was
 22 rendered against the said defendant, and for the plaintiff, in the sum of Thirty-two Thousand Six Hundred Ninety-five (\$32,695.00) Dollars and costs; and the said Adams Express Company having obtained a writ of error from the Circuit Court of Appeals of the United States, for the Sixth Circuit, to reverse the judgment in the aforesaid suit.

Now, therefore, the condition of the above obligation is such that if the said Adams Express Company shall prosecute its said writ of error to effect, and will answer all damages and costs if it fail to make its plea good, then this obligation to be void; else to remain in full force and virtue. Adams Express Company, by W. L. Granbery, Its attorney. National Surety Company, by Haron England, Res. V. Pres. Donald E. Clark, Res. Asst. Secty. (Seal.)

Approved: Sanford, District Judge.

BILL OF EXCEPTIONS.

(Filed Mar. 10, 1922.)

In U. S. District Court.

On the trial of this cause the following evidence was introduced, and the following proceedings had:

W. W. DARDEN, the plaintiff, testified on his own behalf as follows:

That he is a citizen of Davidson County, Tennessee, and had been engaged in breeding, developing, shipping and racing horses for twenty years prior to July, 1915; and had shipped and raced
 23 horses to and on practically all the tracks in the United States excepting some far western tracks, in Montana and California, and had shipped and raced horses in Canada and Mexico, in addition to most of the tracks in the United States; was familiar with the way and manner in which it was then customary to ship thoroughbred horses by express; that he was the owner of six of the horses in the shipment in controversy, five of which were race horses and were killed, and the sixth an ordinary riding pony which was shipped with the race horses, and which escaped injury; that he had shipped these particular horses from Nashville, Tennessee, to Louis-

ville, Kentucky, there being ten horses in the car, and the freight rate was \$67.75 of which \$16 was rental for the Arms Palace Horse Car in which the shipment was made, \$9.40 the fare of the two attendants, and the balance was the freight; and that he knew he was shipping his horses "under a limited liability contract" and was limiting his recovery to a small sum of money, the contract exhibited stipulating that should damage occur for which carrier might be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a stallion \$150.00, and for a horse \$100.00; that he naturally knew that he has to pay more in shipping by express than by freight, but that by shipping by express he does not waive any of his rights for value. "I paid a higher rate for what I was getting and felt and understood that I was getting a higher protection." The \$67.75 paid by him for the car rental and freight rate as above stated, was for a whole car in which ten horses were shipped, four of which belonged to another party; and the horses were shipped by freight from Nashville to Louisville because it was very much cheaper and he had plenty of time to get from Nashville to Louisville, which was a short run, and had then two or three weeks to freshen them up after they got to Louisville, before the races began there; and when he contracted with the defendant to express the horses from Latonia, Kentucky, to Windsor, Canada, the amount he paid to the defendant was for only half a car; and he had to get the horses there quicker, to meet stake engagements and so that they would have time to freshen up before having to race; and he understood also that he was not waiving any of his protection in so expressing them. He paid \$82.50 for shipping six horses and three men from Latonia, Kentucky, to Windsor, Canada. There were at Latonia, Kentucky, at the race track probably 1,250 race horses, of which he owned five; about ten days before July 7th he spoke to the agent of the Adams Express Company, the defendant in this cause, about wanting a two-door steel car to ship his horses from Latonia to Windsor, Canada, and at this time the agent agreed to furnish him such a car for the 6th of July, and at that time told him the rate was \$165.00 per car. The name of this agent of the Express Company was D. W. Fenrock, and the plaintiff knew him and said agent came out on the race track and around the stables and solicited express business for defendant express company, and all his conversations with this agent were out on the race track; and this agent knew plaintiff's horses which he agreed to express, which were very high class race horses that had won a lot of money and had been winning, and attracting attention of people at the race track. He told the agent his horses were entered in several stake races in Canada and he wanted to get his horses there in time to have them fresh for these races, that they were valuable race horses and he wanted to have the car thoroughly cleaned and fumigated so as to take no chances of their being given any disease; and he also told this agent that he had only a very limited time to get these horses from Latonia to Canada, to race in these valuable stake engagements

in Canada; that on the morning of July 6th he saw the agent who explained that he had no car for him but agreed to have a car on July 7th, whereupon it was arranged that plaintiff would have one-half of the car and Seamster and others the other half of the car, and that he would leave his check for \$82.50 for his one-half of the car with his trainer, Henry Loudon, as he (Darden) was going back to Nashville, Tennessee, that night; and the agent promised to have a good steel car the next day for him to ship in; that he took down the names of the three attendants who were to accompany the horses, which included Henry Loudon, his trainer and the man in charge of his horses in his absence.

Plaintiff's conversation with defendant's agent Fenrock on July 6, 1915, occurred about 8:30 or 9:00 o'clock in the morning; and after this conversation began, and the agent had told plaintiff that he was afraid he could not furnish the plaintiff a car that day as he had agreed to do, this agent said to plaintiff that he would go up in the yards and see if he could find a car. The agent then left and went up in the yards and came back to see plaintiff about half past ten or eleven o'clock, and reported to him that he had searched 25 the yards, and there was not a car in the yards "fit to ship in"; and then it was that this agent told plaintiff that he could go on home to Nashville, as he plaintiff wanted to do, and that he would get him a good steel car the next day (July 7th) and have it disinfected and thoroughly cleansed, and plaintiff's horses loaded therein. This agent Fenrock understood that plaintiff was only getting half the car, and that plaintiff was only contracting with reference to that half in which his six horses were to be expressed by defendant; and that this agent of defendant was to have plaintiff's half of the car stalled off for these six horses, and plaintiff then explained to this agent that men owning other horses (Seamster and others) would take and pay for the other half of the car, and that the agent was to collect for his half from these other men. Plaintiff asked this agent Fenrock if he would take plaintiff's check for the \$82.50 for his half of the car, and the agent said the railroads would not allow him to do that; and plaintiff then asked this agent if he would take the check of the Latonia Race Track Association, and he said that would be all right; and plaintiff thereupon told this agent that he would get the Association's check for \$82.50 and leave it with his trainer, Loudon, who would go in the car in charge of plaintiff's horses, and that Loudon would give the agent this check, and the agent would collect for the other half from the men whose horses would occupy the other half of the car, and the agent Fenrock agreed to this; and plaintiff did get the Association's check, and left it with Loudon to give to the agent.

Plaintiff left for Nashville that afternoon and did not know anything about what happened until after the five race horses shipped had been killed on the evening of July 7, 1915—the sixth horse being a little gray pony that accompanied the race horses, but was uninjured in the wreck.

When the plaintiff first offered to prove oral negotiations leading up to making of a shipping contract the defendant objected, upon

the ground that such evidence was incompetent; that one line of decisions of the Supreme Court of the United States holds that as the law requires a contract of shipment to be in writing the presumption is that the law was complied with and the shipment contract in writing; that another line of decisions holds that any agreement or understanding outside of the filed and published tariffs and contract authorized thereby under the orders of the Interstate Commerce Com-

mission is void and unenforceable; that another line of recent cases holds that the written contract required by the Interstate Commerce Commission act is binding upon both shipper and carrier and that neither may act in a way to create a liability different from that prescribed in the written contract. The court thereupon stated "That goes to the weight of the evidence. I will admit it for the present. I will hear argument on these legal questions tomorrow afternoon, but, in the meantime, I will admit it." Thereupon counsel for the defendant stated they desired to except to all questions leading up to the making of the contract, or any effort to vary that written contract by oral testimony, and desired to reserve an exception to the court's ruling. The Court said: "You may do that. I will admit it for the present. I may exclude it later."

The plaintiff further testified that he never saw any paper or shipping contract; that no such contract was proffered to him to sign; that he never authorized any one to sign such a contract for him, and the signing of any written contract was never discussed between him and the agent of the express company; that the only rate quoted him was \$165.00 for the entire car; that no valuation was placed on his horses, nor was he asked to fix any valuation for his horses; that he did not know there was any other rate by which he could ship his horses from Cincinnati, Ohio, to Windsor, Canada, except the rate the agent quoted him; this was the only express rate he ever heard of; that the Adams Express Company agent never showed him any tariff, and the only place he ever saw him was around the race track to see people that he thought would ship horses over his company; and the only thing that was ever said to him about the rate was that the car would cost \$165.00; the only rate that the defendant's agent Fenrock quoted to him at all was \$165.00 for the whole car, or \$82.50 for half of the car; that he never heard of two express rates; that the agent did not say anything to him about any valuations on his horses, nor did he name any values or fix any values on his horses, and that there was no written contract between him and the defendant that he ever signed or knew about, or that he ever authorized anybody to sign for him; and that he never authorized any one to place any valuation on his horses, and that his trainer, Henry Loudon, a colored man, would not and did not know the value of these horses.

The plaintiff further testified that the characteristics of a race horse that go to make up value are earning ability, breeding, disposition and soundness; that no one could even approximately value a race horse who did not "have a practical knowledge of racing and race horses"; and the value of a race horse could not be even approximately reached without knowing its physical

condition as well as the horse's breeding, conformation and racing ability; that he himself did not know the value of the other seven horses shipped in this particular car; that he could approximate the values of some of the horses in the adjoining car belonging to Mr. Bradley; and that of the 1,250 horses at the Latonia track he would know in a general way the value by classification, and those he had watched and had particularly attracted his attention. As to those he might be able to give a pretty fair idea of their value; that Henry Loudon, the man in charge of his horses and the trainer would not know the value of his horses.

All five of plaintiff's horses which were killed in the wreck in question were thoroughbred horses, with their pedigrees matters of record,—all of them being recorded in the American Stud Book, of the Jockey Club of New York; and that any practical horseman who knew his business, and knew the racing ability of a horse by having observed it, and who had looked at the records and knew the horse's breeding and his conformation from looking at him as a horseman would, would have as good a way of valuing a race horse as anybody; and there were numerous men in the United States racing horses who would know if the prices plaintiff put upon his horses which were killed in the wreck in question were not right and proper prices.

When the plaintiff first offered evidence of the value of his horses that were killed, the defendant excepted to the testimony on the ground that the contract of shipment governed, and that nothing outside of that contract, as to such value, could be introduced. Whereupon the court directed the plaintiff to proceed with the proof, reserving the question of law, and when determined such evidence could be excluded, if held to be incompetent.

When plaintiff began to testify upon the subject of pedigrees, characteristics and values of his race horses which were killed, the Court asked counsel for defendant if there was any prospect of their introducing any evidence on the question of value; and to this said counsel replied that they did not expect to do so, and the court thereupon said "you may cut it short then:" and thereupon plaintiff proceeded briefly to prove the recorded pedigrees of these five horses and give their ages, characteristics, conformations and past performances, etc.

28 The plaintiff, testifying further, valued his horses that were killed in this wreck as follows, as of July 7, 1915: Dortch, \$25,000; Little Father, "anywhere from \$12,000 to \$15,000;" Margaret D., "\$5,000 to \$6,000;" Red Coat, "\$7,500 to \$9,000;" Green Horn, \$2,000; that within a week before the horses were killed Margaret D. had been entered in a selling race at a value less than \$800.00 and had not won the race; that the year before Little Father, which was a six-year old gelding when killed, had been entered in a selling race at a value of \$1,000, and had won the race, and had been put up and sold and bought in by himself for a sum less than \$1,500; that Green Horn had never started in a race, but had shown up well in private trials; that in selling races the horse of the least value carried the least weight, and that

it was a courtesy among race horse people not to take advantage of a horse owner who entered his horse at a small value and won the race, although under racing rules any one having a horse in the race would have the right to have the horse put up and sold at auction—the association getting one half of the price brought at the auction above the price for which he was entered and the other one half to the owner.

Plaintiff testified and explained that the fact that two of the horses killed ("Little Father" and "Margaret D.") had been entered in selling races at the times and at the values above stated, had no significance as to the real value of the horses; and that persons owning, racing and purchasing race horses understood this, and that some of the most famous race horses, which had sold for the largest sums in the country, had been horses that ran in selling races.

Plaintiff further testified that a race horse, after being trained and developed, that cannot run and win races is worth no more than an ordinary horse.

The plaintiff further testified to facts tending to prove that the wreck and killing of the horses was caused by the negligence of the P. C. C. & St. L. Ry. Co., because of the defective condition of its car in which the horses were loaded and being transported for the Adams Express Company from Latonia, Kentucky, to Windsor, Canada, and thus causing the wreck of the train about twelve miles East of Cincinnati, Ohio, on the Railway's tracks running from Cincinnati to Columbus, Ohio, on the evening of July 7, 1915.

No other evidence with respect to the value of the horses,
29 or the making of a contract, except as hereinabove set out,
was given by this witness.

HENRY LOUDON testified that he had been in the race horse business, exercising and caring for them, about 45 years, and was in July, 1915, training for plaintiff Darden; that he was present and loaded plaintiff's horses on the car on the evening of July 7, 1915, and that Seamster made out the contract and that plaintiff, Darden, left with him a check to give to "Mr. Seamster . . . or whoever was going to pay for the car;" that Seamster "fixed the contract up," and he, Loudon, gave to the express agent who was making out the contract there at the car after the horses were loaded the check left with him by plaintiff Darden; that while he did not sign this shipping contract, the witness was then asked: "Did you ever see this contract before that you know of?" Answer: "No, sir, not that one. I have seen lots like it." "Have you seen contracts like this?" Answer, "Yes, sir, very often." That when the horses were loaded the agent of the express company filled in the contract right there at the car, using a book to write on; that the agent did not present this contract to the witness for his signature.

The first time witness saw the car in which the horses were shipped and killed was in the yards at Latonia near the stock chute, about 10:00 o'clock on Tuesday morning, July 6, 1915. Mr. Darden's horses and the other horses were loaded into the car on Wednesday afternoon, July 7, 1915, after Mr. Darden had left Latonia to go to

his home in Nashville. The witness further testified that Mr. Darden left with him the check for \$82.50 which he handed to the Express Agent, Mr. Fenfrock, for Mr. Darden's half of the car. The witness was shown what purported to be a written contract of shipment, hereinafter referred to, and which appears to have his name signed to the "Attendant's Contract" therein. The witness testified that he did not sign his name to said contract, and that he had never seen that contract before. He said he had seen contracts like it very often. He had seen "lots like it." He said he remembered the occasion when Mr. Fenfrock and Mr. Seamster signed up this contract, and that the express agent, Mr. Fenfrock, was doing the writing, and that said agent filled in the contract; and that he did *did* not sign the contract, nor was the same offered to him to sign. He said that no copy of this signed contract was turned over to him, nor did he take it. He said he could not swear that 30 Mr. Seamster took it. He did not know who took it. He knew he did not take it.

The contract of shipment, which had been marked defendant's exhibit No. 2 on a former trial and was marked Plaintiff's Exhibit No. 2 on this trial, and which included the attendant's contract, was then introduced, and is as follows:

PLAINTIFF'S EXHIBIT NO. 2.

Release Form No. 3 (June, 1915).

Notice to Shippers.—The Shipper must state the actual value of the shipment, which value must be inserted in the contract. This Company's charges on Live Animals, Live Birds, Live Stock, and Reptiles are based upon the actual value per animal, bird, or reptile, which value must be declared by the shipper on each animal, bird, or reptile, in the shipment, and in case the shipment consists of more than one animal of exceptional value, each animal must be described by name or registration number and the actual value thereof stated in the contract.

Adams Express Company.

Non-negotiable Live Stock Contract.

(In Triplicate.)

This Contract, made at Latonia, Ky., on the 7th day of July, 1915, between The Adams Express Company, party of the first part, hereinafter called the Express Company, and W. W. Darden, hereinafter called the Shipper, party of the second part, for the transportation of the shipment described in section 5 of this contract, consigned to W. W. Darden at Windsor, Ont., Canada, Witnesseth:

Section 1. The Express Company undertakes to forward, subject to the classification and tariffs in effect on the date hereof, to the point reached by the Express Company which is nearest to des-

tion, the animals and paraphernalia hereinafter described in section 5 of this contract, of which the shipper declares himself to be the owner (or duly authorized agent of the owner) for the sum named in column 4 of section 5 of this contract, which charge is dependent upon the actual value of said animals and paraphernalia stated by the Shipper as hereinafter mentioned.

Section 2. And in consideration of the premises, said parties agree: that the Shipper before delivering the said animals and paraphernalia to the Express Company, demanded to be advised of the rates to be charged for the carriage of said animals and paraphernalia as aforesaid, and thereupon was advised by the Express Company, that the rate depended upon the actual value of said animals and paraphernalia, such value to be stated by the Shipper, and according to the following tariff of charges, viz:

Section 3. The classification minima rates on live animals, live birds or live stock apply only when the value does not exceed the following, to-wit:

For Horses, Jacks or Mules, \$100.00 each;

For Bulls, Burros, Calves, Colts, Cows, Deer, Dogs, Elks, Goats, Hogs, Ponies, Sheep, Steers, or animals not otherwise specified, \$50.00 each;

For Cats, Ferrets, Guinea Pigs, Hares, Mice, Opossums, Prairie Dogs, Rabbits, Squirrels, Fancy Pigeons or Fancy Fowls, or other Live Fowl (except Common Market Poultry), Birds or Reptiles, \$5.00 each, and not exceeding \$50.00 on each shipment weighing 100 pounds or less and not more than 50 cents per pound actual weight on each shipment weighing more than 100 pounds;

For a carload of Jacks or Mules, \$100.00 for each animal;

For a carload of Horses, \$100.00 for each horse, accompanied by paraphernalia (such as Sulkies, Harness, etc.), of a value not exceeding \$50.00;

For a corload of Bulls, Burros, Calves, Colts, Cows, Deer, Dogs, Elks, Goats, Hogs, Ponies, Sheep, Steers, or animals not otherwise specified, not exceeding \$50.00 for each animal.

When the value of the shipment exceeds the value stated above, an addition to the above mentioned charge will be made according to the following schedule, to-wit:

When the first-class rate is	The additional charge will be
Not over \$2.00 per 100 lbs.	1 per cent of excess value.
Over \$2.00 per 100 lbs. and not over \$3.00 per 100 lbs.	1½ per cent of excess value.
Over \$3.00 per 100 lbs. and not over \$5.00 per 100 lbs.	2 per cent of excess value.
Over \$5.00 per 100 lbs.	2½ per cent of excess value.

Section 4. The shipper now states the values hereinafter mentioned in section 5 of this contract to be the true values of said animals and of the paraphernalia so to be shipped.

Section 5.

Column 1.	Column 2.	Column 3.	Column 4.
Number and kind of animals or birds.	Value and name of registra- tion num- ber of each animal or bird.	Value of pa- raphernalia (sulkies, saddles, etc.).	Total charge on the ship- ment from shipping point to destina- tion.
	Dollars. Cents.	Dollars. Cents.	Dollars. Cents.
13 Running Horses...	100 00		

Section 6. The shipper agrees that the Express Company shall not be liable for the conduct or acts of the animals to them-
 32 selves, or to each other, such as biting, kicking, goring or smothering, nor for loss or damage arising from the condition of the animals themselves, or which results from their nature or propensities, which risks are assumed by the Shipper. The shipper hereby releases and discharges the Express Company from all liability for delay, injuries to or loss of said animals and paraphernalia, from any cause whatever, unless such delay, injury or loss shall be caused by the Express Company or by the negligence of its agent or employees.

Section 7. If any sum of money besides the charges for transportation is to be collected from the consignee on the delivery of said animals, and the same is not paid at once, the shipper agrees that the Express Company, may at its option, retain said animals with ordinary and reasonable care, at the risk and expense of the Shipper, or may return same to the Shipper, the Shipper to pay charges for transportation both ways and all other expenses.

Section 8. Where said animals are accompanied by the owner or an attendant in his employ, the following further conditions shall apply, viz: The Shipper agrees to load, transship and unload said animals at his own risk, the Express Company furnishing the necessary laborers to assist. The Shipper shall take care of, feed and water said animals while being forwarded or transported, whether delayed in transit or otherwise, and the Express Company shall not be under any liability or duty with reference thereto except in the actual forwarding thereof. The Shipper further undertakes to see that all doors and openings in the cars in which said animals are shipped are at all times so closed and fastened as to prevent the escape of any of said animals or injury thereto, and the Express Company shall not be liable on account of the escape of any of said animals or any injury thereto resulting from open doors or defective ventilation.

Attendants when transported free will be permitted to ride only in the car in which the animals are transported or in smoking cars, or second-class cars of the train, when furnished.

Section 9. The Shipper agrees that as a condition precedent to recovery hereunder for loss or injury or damage to or delay in delivery of this shipment, such loss, injury, damage or delay shall be proved by the Shipper to have been caused by negligence of the carrier, and in consideration of the free carriage of a person or persons as his agent or agents in charge of said animals, where

33 permitted under the Terminal and Switching Charges Tariff I. C. C. No. A-1394, supplements thereto and re-issues thereof, to indemnify and save harmless the Express Company from all claims, liabilities and demands of every kind, nature and description by reason of personal injuries sustained by said person or persons so in charge of said animals, whether the same be caused by negligence or otherwise.

Section 10. Upon the arrival of said animals and paraphernalia at destination, the Shipper or consignee shall forthwith receive said animals and paraphernalia and pay the charges due thereon, and if from any cause the Shipper or Consignee shall fail or refuse to duly receive the same and pay any such charges, then the Express Company, or the connecting carrier having said animals and paraphernalia in charge, may, as the Agent of the Shipper, have said animals and paraphernalia put and provided for in some suitable place at the cost and risk of the shipper or consignee, and at any time or times thereafter may sell the same or any number of them, at public or private sale, with or without notice, as the said agent may deem necessary or expedient, and apply the proceeds arising therefrom, or so much as may be needed, for the payment of any freight or charges that may be due, and other necessary and proper costs and expenses.

Section 11. Claims for loss, damage or delay must be filed with the carrier at the point of delivery or at the point of origin within four months, and suits must be instituted within two years after delivery, or, in case of failure to deliver, after a reasonable time for delivery has elapsed.

Unless claims are so filed and suits so brought the carrier shall not be liable.

Section 12. The provisions of this contract shall inure to the benefit of and be binding upon the consignor, the consignee, and all the carriers handling this shipment, and shall apply to any reconsignment or return thereof.

Signed in triplicate: Adams Express Company, (Signed) by D. W. Fenrock, Agent, Party of the First Part. (Signed) W. Seamster, (Owner or Duly Authorized Agent of the Owner), Party of the Second Part.

34 *Attendants' Contract.*

This Contract, made at the same place at which the annexed Live Stock Contract was executed on the same date upon which said Live Stock Contract was made Witnesseth:

Whereas, the annexed Live Stock Contract has been made for the transportation of certain animals as described therein; and

Whereas, it is necessary that the owner, or some person on his behalf, shall accompany and take charge of said animals;

In consideration of the free transportation of the undersigned attendant or attendants, where permitted under the Terminal and Switching Charges Tariff I. C. C. No. A-1394, supplements thereto and reissues thereof, upon the same train or trains, wherein animals referred to in the foregoing contract are forwarded or transported, which said animals are to be under the charge of the undersigned, said transportation being performed at the instance and request of the undersigned, and it being made known to each of the undersigned that each respective express company does by contract agree to hold each of the railroad companies over which the undersigned is being transported as herein set out harmless against any injury or damage to the undersigned while being transported as therein set forth, each of the undersigned agrees that each of the carriers or railroads companies mentioned in the foregoing contract as to the transportation of the undersigned attendants is to perform a service not required of a carrier of passengers and not required of a common carrier and as to such transportation each of said carriers, express companies and railroad companies is and shall be liable only as a private carrier and each of the undersigned attendants does severally agree to assume all risks of accident or damage to himself and does hereby release and discharge said Adams Express Company and any connecting express company and any railroad company which may at any time be engaged in transporting, carrying or forwarding said animals or any of them and said attendants or any of them from any and all claims, liabilities and demands of every kind, nature and description for and on account of any injury or damages to person or property of any kind or nature sustained by him, whether the same be sustained while in, upon or about said cars or passing over or along the
 35 tracks or grounds of any of said railroad companies and whether caused by negligence or otherwise; and said attendants and the undersigned owner or owners do each for himself, his heirs and representatives agree to protect and hold said Adams Express Company and any connecting express company and any of the said railroad companies harmless from all claims, liabilities and demands of every kind, nature and description by reason of any such injury or loss of life or property.

Witness the hands and seals of the parties hereto on the date aforesaid. (Signed) W. Seamster (Owner or duly authorized agent of Owner). (Seal.) (Signed) A. W. Booker. (Seal.) (Signed) B. Epperson, Attendant. (Seal.) (Signed) H. Loudon, Attendant. (Seal.) (Signed) E. Jones, Attendant. (Seal.) (Signed) F. Easley, Attendant. (Seal.) D. W. F. Paid \$165.00.

Statement Required of Shippers of Live Stock by Express under Regulations of United States Department of Agriculture, Bureau of Animal Industry.

This is to Certify that the 13 Running Horses delivered by me
(Description of stock.)

36 this day to the Adams Express Company and consigned to
W. W. Darden at Windsor, Ont., Canada are not affected with
(Consignee.) (Destination.)

glanders, or any other contagious, infectious or communicable
disease. (Signed) W. Seamster. Dated at Latonia, Ky., July 7,
(Shipper.)

1915.

(NOTE.—Attached to the foregoing contract was attached and properly cancelled, U. S. Internal Revenue Documentary Stamp, as required.)

It being in the opinion of the District Judge proper that the aforesaid original livestock contract and attendant's contract should be inspected in the Circuit Court of Appeals upon review, it is ordered that the same be safely kept by the Clerk of this court, and that if this case is taken to the Circuit Court of Appeals by writ of error, the clerk send said original live stock and attendant's contract by express to the Clerk of the Circuit Court of Appeals in connection with the transcript, to be returned to the clerk after consideration by the Circuit Court of Appeals in accordance with rule 15 of the Circuit Court of Appeals.

The defendant upon cross examination of said witness introduced in evidence as its exhibit No. 4 certain filed and published tariffs certified by the Secretary of the Interstate Commerce Commission, and as its exhibit No. 5 supplement part 1 to Official Express Classification No. 23, likewise so certified, issued May 31, 1915. The said certificate is in the following words and figures, namely:

DEFENDANT'S EXHIBITS 4 AND 5.

"I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the schedules hereto attached, and more particularly hereinafter described, are true copies of schedules filed with the said Interstate Commerce Commission on dates specified below, to-wit:

Title Page and Rules Section of F. G. Airy, Agent I. C. C. No. A-3, filed December 31, 1913, and Kentucky Section of said I. C. C. No. A-3, filed December 31, 1913, said sections having been in force throughout the month of July, 1915, as amended by Supplement No. 23 to said I. C. C. No. A-3.

Supplement No. 23 to said I. C. C. No. A-3, filed May 20, 1915.

37 F. G. Airy, Agent, Local and Joint Block Tariff I. C. C. No. A-834, filed on December 31, 1913, and having been in force throughout the month of July, 1915, as amended by Supplements Nos. 5 and 6 thereto.

Supplement No. 5 to said I. C. C. No. A-834, filed December 23, 1914.

Supplement No. 6 to said I. C. C. No. A-834 filed May 10, 1915.

F. G. Airy, Agent, Local and Joint Block Tariff I. C. C. No. A-1281, filed on April 22, 1914, and having been in force throughout the month of July, 1915, as amended by Supplement No. 2 thereto.

Supplement No. 2 to said I. C. C. No. A-1281, filed February 23, 1915.

F. G. Airy, Agent, Terminal and Switching Charges tariff I. C. C. No. A-1394, filed on August 14, 1914, and having been in force throughout the month of July, 1915, as amended by Supplement No. 5 to said I. C. C. No. A-1394.

Supplement No. 5 to said I. C. C. No. A-1394, filed April 16, 1915.

F. G. Airy, Agent, Official Express Classification No. 23, I. C. C. No. A-1450, filed on April 9, 1915, and having been in force throughout the month of July, 1915, as amended by Supplement No. 1 thereto.

Supplement No. 1 to said I. C. C. No. A-1450, filed May 29, 1915.

F. G. Airy, Agent, Tariff I. C. C. No. A-1624, filed on April 10, 1915, and having been in force throughout the month of July, 1915.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 22nd day of April, A. D. 1916. (Signed) George B. McGinty, Secretary of the Interstate Commerce Commission. [Seal.]

And it appearing to the District Judge that it is proper that the aforesaid tariffs and classification should be inspected in the Circuit Court of Appeals upon review, it is ordered that the same be safely kept by the Clerk of this court, and that if this case is taken to the Circuit Court of Appeals by writ of error, the clerk shall send said original tariffs and classification contract by express to the clerk of the Circuit Court of Appeals in connection with the transcript, to be returned to the clerk after consideration by the Circuit Court of Appeals in accordance with rule 15 of the Circuit Court of Appeals.

The defendant upon the cross examination of this witness also introduced as its Exhibit No. 3, an order of the Interstate Commerce Commission made on the 25th day of May, 1915, duly certified by the clerk of said commission, and reading as follows:

DEFENDANT'S EXHIBIT NO. 3.

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 25th Day of May, A. D. 1915.

No. 4198.

In the Matter of Express Rates, Practices, Accounts, and Revenues.

Supplemental Order No. 13.

Upon further consideration of the record in this case, and in the light of the Cummins Amendment to the act to regulate commerce,

It is ordered, That the order of July 24, 1913, as modified November 4, 1913, January 28, May 5, June 9, July 11, 1914, and March 18, 1915, be further modified in the following particulars:

Amend the form and terms and conditions of the Uniform Express Receipt so that they will read as follows:

Uniform Express Receipt.

— Express Company.

Non-negotiable Receipt.

— —, 1916.

Received from — —, subject to the classifications and tariffs in effect on the date hereof, — —, value herein stated and warranted by shipper to be — (See foot note) dollars.

Consigned to — —, at — —. Charges, —.

39 Which the Company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof, accepts and signs this receipt. — —, Shipper. — —, for the Company.

NOTE.—The Company's charge is based upon the character of the property, of which its value is an element, and its value must be declared in writing by the shipper unless its character is otherwise disclosed. When goods are hidden from view by wrapping, boxing or other means and the company is not notified of the character thereof, the shipper's declaration of value may be made by notation, "not exceeding \$50.00" or "not exceeding \$50.00 or 50 cents per pound, actual weight."

On Back of Uniform Express Receipt.

No. 4198.

Terms and Conditions.

1. The provisions of the receipt shall inure to the benefit of and be binding upon the consignor, the consignee and all carriers

handling this shipment, and shall apply to any reconsignment or return thereof.

2. The rate charge for carrying said property is dependent upon the actual value of the property which must be specifically stated in writing by the shipper, and applies only upon property of an actual value not exceeding fifty dollars for any shipment of one hundred pounds or less, or not exceeding fifty cents per pound, actual weight, for any shipment in excess of one hundred pounds. If the actual value is greater than fifty dollars for any shipment of one hundred pounds or less, or exceeds fifty cents per pound, actual weight, for any shipment in excess of one hundred pounds, such actual value must be specifically stated in writing by the shipper, and excess charges for such greater value must be paid therefor in accordance with the lawfully published tariffs of the company.

3. Said property is accepted as merchandise only, and the Company shall not be liable for the loss of money, bullion, bonds, coupons, jewelry, precious stones, valuable papers or other matter of extraordinary value, unless such articles are enumerated in the receipt, as the Company does not transport such articles except through its money department.

40 4. Unless caused by its own negligence or that of its agents, the Company shall not be liable for—

a. Difference in weight or quantity caused by shrinkage, leakage or evaporation.

b. The death, injury or escape of live freight.

5. Unless caused in whole or in part by its own negligence or that of its agents, the Company shall not be liable for loss, damage or delay caused by—

a. The act or default of the shipper or owner.

b. The nature of the property, or defect or inherent vice therein.

c. Improper or insufficient packing, securing or addressing.

d. The Act of God, public enemies, authority of law, quarantine, riots, strikes, perils of navigation, the hazards or dangers incident to a state of war, or occurrence in Customs warehouse.

e. The examination by, or partial delivery to, the consignee of C. O. D. Shipments.

f. Delivery under instructions of consignor or consignee at stations where there is no agent of the Company after such shipments have been left at such stations.

6. Packages containing fragile articles or articles consisting wholly or in part of glass must be so marked and be packed so as to insure safe transportation by express with ordinary care.

7. If no express company has an agency at the point of destination, said property may be carried to the agency nearest or most convenient thereto and the consignee notified.

8. Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months and suits must be instituted within two years after delivery, or in case of failure to deliver after a reasonable time for delivery has elapsed.

Unless claims are so made and suits so brought the carrier shall not be liable.

9. If any C. O. D. is not paid within thirty days after notice of non-delivery has been mailed to the shipper, the Company may, at its option, return the property to the consignor and collect the charges for transportation both ways.

10. The Company shall not be required to make free delivery at points where it maintains no free delivery service nor at
41 any point beyond its established and published delivery limits.

Special Additional Provisions as to Shipments Forwarded from the United States to Places in Foreign Countries.

11. If the destination specified in this receipt is in a foreign country, the property covered hereby shall, as to transit over ocean routes and by their foreign connections to such destination, be subject to all the terms and conditions of the receipts or bills of lading of ocean carriers as accepted by the Company for the shipment, and of foreign carriers participating in the transportation, and as to such transit is accepted for transportation and delivery subject to the acts, ladings, laws, regulations and customs of oversea and foreign carriers, custodians and governments, their employes and agents.

12. The Company shall not be liable for any loss, damage or delay to said shipments over ocean routes and their foreign connections, the destination of which is in a foreign country, occurring outside the boundaries of the United States which may be occasioned by any such acts, ladings, laws, regulations or customs.

13. It is hereby agreed that the property destined to such foreign countries, and assessable with foreign, governmental or customs duties, taxes or charges, may be stopped in transit at foreign ports, frontiers or depositories, and there held pending examination, assessments and payments, and such duties and charges, when advanced by the Company, shall have become a lien on the property.

Amend the hereinafter specified rules of the Official Express Classification so that they will read as follows:

Rule 1 (j). Third-class Rates are applicable to commodities herein classified as third class and are 1 cent for each 2 ounces or fraction thereof, minimum charge 15 cents, but the charge at third-class rates must not be more than the charge at first-class rates.

Each package should have the name of the article or articles contained therein written, stamped or printed thereon.

The true value, which must not exceed \$10.00, or the notation "Value Not Exceeding \$10.00" must be placed on the package by the shipper and entered on the receipt.

42 Rule 2 (b). A receipt of the form prescribed herein must be given for all matter received. The actual value of the property must be specifically stated in writing by the shipper, and should be inserted in the receipt, marked on the package and entered in the waybill.

When goods are hidden from view by wrapping, boxing or other means and the Company is not notified of the character thereof, the shipper's declaration of such actual value may be made by inserting "not exceeding \$50.00" or "not exceeding 50 cents per pounds, actual weight," as the case may be, in the blank space in that portion of the receipt reading "Value herein stated and warranted by the shipper to be \$—."

Rule 13 (b). When the value declared by the shipper exceeds \$50.00 on a shipment weighing 100 pounds or less or exceeds 50 cents per pound on shipment weighing more than 100 pounds, the charge for such express value will be at the rate of 10 cents on each \$100.00 or any fraction of \$100.00.

Rule 13 (f). Valuation Charges on Live Animals, Live Birds or Live Stock:

The Classification minima rates on Live Animals, Live Birds or Live Stock apply only when the value does not exceed the following:

Horses, Jacks or Mules, \$100.00 each.

Bulls, Burros, Calves, Colts, Cows, Deer, *Dog*, Dogs, Elks, Goats, Hogs, Ponies, Sheep, Steers or Animals not otherwise specified, \$50.00 each.

Birds, Cats, Ferrets, Guinea Pigs, Hares, Mice, Opossums, Prairie Dogs, Rabbits, Rats, Squirrels, Fancy Pigeons or Fancy Fowls or other Live Fowls (except market), or Reptiles, \$5.00 each, but not more than \$50.00 for each shipment weighing 100 lbs. or less and not more than 50 cents per pound actual weight on each shipment weighing more than 100 lbs.

The shipper must declare the actual value of each animal shipped. In the event the shipper refuses to declare such actual value, the shipment must be declined.

When the value exceeds that given above, an additional charge must be made on the excess value according to the following:

When the first-class rate is not over \$2.00 per 100 lbs. additional charge will be 1 per cent of the excess valuation.

When the first-class rate is over \$2.00 and not over \$3.00
43 per 100 lbs. the additional charge will be 1½ per cent of the excess valuation.

When the first-class rate is over \$3.00 and not over \$5.00 per 100 lbs. the additional charge will be 2 per cent of the excess valuation.

When the first-class rate is over \$5.00 per 100 lbs. the additional charge will be 2½ per cent of the excess valuation.

It is further ordered, That the respondents be, and they are hereby, notified and required to establish, on or before June 2, 1915, upon one day's notice to the Interstate Commerce Commission and the general public by filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and for a period of two years from February 1, 1914, maintain the changes herein ordered to be made in the form and terms and conditions of the uniform express receipt and the rules of the official express classification, unless otherwise ordered by the Commission.

It is further ordered, That express classifications issued in com-

pliance with this order shall bear on the title pages thereof the following notation:

Issued in compliance with Interstate Commerce Commission's Supplemental Order No. 13, of May 25, 1915, in case No. 4198.

And it is further ordered, That a copy of this order be served upon each of the parties to these proceedings. By the Commission: George B. McGinty, Secretary. [Seal.]

E. R. BRADLEY, a witness for plaintiff, testified that he was the owner of the Idle Hour Stock Farm, near Lexington, Kentucky; that he was at the race meeting in Louisville and Latonia preceding the wreck in which plaintiff's horses were killed; that he himself had horses in the car behind the plaintiff's car at the time and place of the wreck, some of which were killed and injured; and from his knowledge of the value of race horses, and his knowledge and observation of the plaintiff's horses, he qualified himself to speak of the value of said three horses belonging to plaintiff, and which were killed in the wreck in question, and to recover the value of which this suit was brought, and he proved the following values for said three horses of plaintiff: "Dortch at the time he was killed was worth 'from \$20,000 to \$25,000'"; "Little Father from \$7,500 to \$10,000"; and "Margaret D. 'in the neighborhood of \$6,000.'" 44

This witness also testified that he visited the scene of the wreck the day after it occurred, and observed the wrecked car in which plaintiff's horses were being shipped at the time they were killed, and observed other signs of the wreck and of the windstorm, and proved facts tending to establish that the wrecking of the car and the killing of plaintiff's horses was proximately caused by the negligence of the defendant, Adams Express Company, and its agent the transporting Railway Company which owned the car in which plaintiff's horses were being shipped, and which was transporting same for the Express Company at the time and place of the wreck; and facts which tended to show that the wreck was not proximately caused or contributed to by any wind-storm, as an act of God; and no further proof or other testimony was given by this witness.

K. SPENCE, a race horse trainer, introduced by plaintiff, after qualifying himself to speak in regard to the value of three of plaintiff's horses, testified only upon the question of the value of the horses killed in the wreck, as follows:—"Dortch, \$20,000 to \$25,000; Little Father, \$10,000; Margaret D., \$5,000 to \$7,000 or \$8,000."

With respect to Green Horn and Red Coat, the witness said that only those who had trained these two horses would be able to speak intelligently of their value.

No further or other testimony was given by this witness.

W. SEAMSTER introduced by plaintiff thereupon testified that he was interested in one horse that was among the seven horses in the other half of the car from the half of the car occupied by plaintiff's six horses,—there being thirteen horses in the car at the time and

place of the wreck; and upon being handed plaintiff's Exhibit No. 2, purporting to be a contract of shipment, this witness testified that it was his signature which appeared as the bottom signature, "W. Seamster," at the top of page 3 of said printed contract; and that the name "W. Seamster" appearing as the top signature to the "Attendant's Contract" on page 3 of said printed contract was not signed by him.

This witness further testified that he did not give the agent any information in regard to the value of any horses in the car, and that he just merely signed the contract at the top of page 3 thereof because he was asked to do so by the agent, and there is always somebody in charge of the car and he signed it because he was there, and had a horse in the car. He further testified that he did not read the

45 contract and that he was not authorized by Mr. Darden to sign it for him, or as his agent, and that Mr. Fenrock, the express company's agent, knew he had one end of that car and that the plaintiff, Darden had the other end of the same car and paid for it; and knew that he paid \$82.00 and something for his end of it, in which there were seven horses.

This witness further testified that there were four different persons owning the seven horses in the half of the car that the witness settled for with the agent, and that he collected \$82.50 for that half of the car from these several men, and paid same to the agent; and that all the witness undertook to do was to collect the money from the others in his half of the car, and pay the agent of the express company for that half.

The witness further testified that he did not "undertake to exercise any rights or make any representations or do anything with reference to the end of the car that Mr. Darden occupied," nor did he undertake to make any payment therefor; and that he told the Express Company's agent that he was merely paying for one-half of the car, and to get the other half from Mr. Darden's man, Loudon.

In regard to the alleged printed contract of shipment, plaintiff's Exhibit No. 2, this witness further testified that he did not write into that contract the statement on page 2 thereof—"13 running horses, value \$100.00," and that while there were 13 horses in the car the witness was only interested in one, and had charge of two others, while three other men owned the other four, thus making up the seven horses in one-half of the car, while the plaintiff, Darden, owned the six horses in the half of the car which he settled for; and that Mr. Darden never authorized him to sign any contract for him; and that Fenrock, the Express Company's agent, knew that witness was not the agent of the owner of plaintiff's horses, because he told the Express Company's agent, Fenrock, that he would have to collect for Mr. Darden's horses in the half of the car that plaintiff was occupying, from plaintiff's man, Loudon.

This witness, who was in the car at the time of the wreck, and who proved conversations between Mr. Darden and Mr. Fenrock, the agent of the Express Company; and who proved conversations between himself and the Express Company's Agent when the car was being loaded with the horses, testified to facts tending to prove

and establish that the wrecking of the car and the consequent killing of the plaintiff's horses was due to the negligence of the defendant, Adams Express Company, and the Railway Company which owned the car and was transporting it for the Adams Express Company at the time and place of the accident.

STIPULATION AS TO FACTS.

It was thereupon stipulated and agreed in open Court between the plaintiff and the defendant that the defendant, Adams Express Company, is a transportation company, is a corporation chartered under the laws of the State of New York, with an office in this Federal District, and that it transacted its business in the usual way; and that there was no question about the jurisdiction of the Court.

It was thereupon and in the same way stipulated between the parties that the defendant, Adams Express Company, as a transportation company, received the horses of the plaintiff for transportation and had them loaded into the car in question, and that said car was then on the rails of the Louisville & Nashville Railroad Company at Latonia, Kentucky; and that defendant then routed and had the same delivered, after being hauled over into Cincinnati, Ohio, by the last mentioned railroad company, to the Pittsburgh, Cincinnati, Chicago & St. Louis Railway, known as the Pan-Handle, one of the Pennsylvania Lines, and that the car was then proceeding on the rails and lines of said last mentioned company, on its journey towards Windsor, Canada, a city located in a foreign country adjoining the United States, and was on that journey at the time and place of the wreck.

It was then further stipulated that in addition to the horses belonging to plaintiff in the car when the wreck occurred, plaintiff also had other articles of personal property in the way of paraphernalia, blankets, saddles, etc., including cash to the amount of \$20.00 which the witness Loudon had on him, that belonged to plaintiff, and that all these articles were in the car and lost in the wreck; and that these articles of property aggregated in value \$178.00.

The foregoing was all the evidence introduced by the plaintiff in chief, on the trial of this cause, except the evidence of numerous witnesses not included herein, who testified to facts tending to prove and establish that the wreck in question and the consequent killing of plaintiff's horses, was proximately caused by the negligence of the defendant Adams Express Company and its agent the railway company, which owned the car in question and was transporting the same for the Adams Express Company at the time and place of the accident and wreck; and tending to show that said wreck was not caused, nor proximately contributed to as a proximate cause, by any act of God, i. e.: the storm prevailing at the time and place of the wreck in question.

And thereupon the defendant made the following motion:

MOTION TO EXCLUDE CERTAIN EVIDENCE.

"The defendant moves the Court to withdraw and exclude from the consideration of the jury all evidence relating to the question of the value of the horses involved in this suit being contained in the testimony of plaintiff W. W. Darden, E. R. Bradley and K. Spence, on the ground that said evidence tends to vary the terms and provisions of the written contract of shipment introduced by the plaintiff as evidence in this case, and also tend to vary the written terms of the contract prescribed by the Interstate Commerce Commission in the filed and published tariffs under which this shipment was made."

Which motion the Court overruled, to which action the defendant then and there excepted.

Thereupon the defendant made the following motion:

MOTION TO EXCLUDE CERTAIN EVIDENCE.

"Comes the defendant and moves the court to withdraw and exclude from the consideration of the jury all evidence offered on behalf of the plaintiff tending to show any agreement, understanding or promise on the part of defendant's agent to furnish the plaintiff with any particular kind of car on any particular date, upon the ground that such evidence tends to vary the terms and provisions of the published tariffs filed with the Interstate Commerce Commission and which govern the shipment in question."

Which motion the Court overruled, and the defendant then and there excepted to the court's action in so doing.

MOTION TO DISMISS.

The defendant then moved the court to dismiss the plaintiff's suit because the plaintiff had by his own testimony disclosed to the court the illegality in the contract upon which his suit is based, in that it appears that the plaintiff shipped his horses on a valuation which was less than actual value, and resulted in the plaintiff receiving a rebate for the shipment of his horses, contrary to the filed and published tariffs governing the shipment, which motion the Court overruled and the defendant seasonably excepted.

48 Thereupon the defendant introduced proof tending to show that the wreck (which occurred about 12 miles above Cincinnati, Ohio, on the lines of the P. C. C. & St. L. Railway and while the shipment was en route from Latonia, Kentucky, to Windsor, Canada,) and the consequent destruction of five of the six horses shipped by the plaintiff resulted from an act of God, viz: a violent windstorm, and that no negligence of the Railway proximately contributed to the accident to, and death of plaintiff's property; and

the defendant did not offer evidence upon any other question or subject; and thereupon the defendant rested its case.

The plaintiff then introduced testimony of experts in rebuttal, tending to show that the wreck as a result of which the plaintiff's horses were killed was not proximately caused or contributed to by the windstorm prevailing at the time and place thereof.

And at the conclusion of all the evidence the defendant made the following motion:

MOTION TO EXCLUDE CERTAIN TESTIMONY.

"Comes the defendant and moves the court to withdraw and exclude from the consideration of the jury all evidence offered on behalf of the plaintiff tending to show any agreement, understanding or promise on the part of defendant's agent to furnish the plaintiff with any particular kind of car on any particular date, upon the ground that such evidence tends to vary the terms and provisions of the published tariffs filed with the Interstate Commerce Commission and which govern the shipment in question."

Which motion the court overruled, and the defendant seasonably excepted to the Court's action.

Thereupon the defendant made the following motion:

MOTION TO DISMISS.

"Comes the defendant and renews its motion, made at the conclusion of the plaintiff's testimony in this cause, to dismiss the plaintiff's suit because the plaintiff had by his own testimony disclosed to the Court the illegality in the contract upon which his suit is based, in that it appears that the plaintiff shipped his horses on a valuation which was less than actual value, and resulted in the plaintiff receiving a rebate for the shipment of his horses, contrary to the filed and published tariffs governing this shipment."

49 Which motion the court overruled, and the defendant seasonably excepted.

Thereupon the defendant made the following motion:

MOTION FOR DIRECTED VERDICT.

"Comes the defendant and moves the court to direct the jury to return a verdict for the defendant, because:

(a) The plaintiff by his own testimony disclosed to the court the illegality in the contract upon which his suit is based, in that it appears the plaintiff shipped his horses on a valuation which was less than actual value, and resulted in the plaintiff receiving a rebate for the shipment of his horses, contrary to the filed and published tariffs governing the shipment.

(b) Because it appears from the plaintiff's declaration, and the evidence offered on behalf of the plaintiff, that he based his suit on an alleged oral contract, entered into between the plaintiff and an agent of the defendant, which oral contract is not permissible under, and is contrary to the published tariffs filed with the Interstate Commerce Commission and is, therefore, illegal and void and cannot be made the basis of recovery.

(c) Because the contract entered into between the plaintiff and the agent of the defendant, under which the shipment of horses was made, is in violation of the statutes of the United States and therefore illegal and void and cannot form the basis for a recovery in favor of the plaintiff, in that they are not in accordance with filed and published tariffs such as are required by the statutes governing the transportation of interstate commerce.

(d) Because it appears from the undisputed evidence that the proximate cause of the wreck, and the consequent injury to plaintiff's property, resulted directly from an act of God, to-wit: a wind-storm, and there is no material evidence tending to show any concurring negligence the part of the carrier, which contributed proximately to the wreck and consequent injury to plaintiff's property."

Which motion the court overruled, and the defendant seasonably excepted.

The Court in overruling the defendant's motion made at the conclusion of the plaintiff's testimony and taken under advisement until a later date of the trial, said:

50

MEMORANDUM BY THE COURT.

"The motion made by the defendant, at the conclusion of the plaintiff's evidence to exclude all evidence of value and put in the alternative, to direct a verdict in favor of the defendant, which I held under advisement, must be denied.

"I have carefully considered the Cummins Amendment, and I am unable to avoid the conclusion that it intended to make the carrier liable for the full value of the property, regardless of any limitation in the receipt, bill of lading or tariff, save in the one case where the goods were hidden in the package, where the carrier might require the shipper to state the value, and the shipper would be limited to that value. I cannot avoid the broad language of the statute.

"I am very much inclined—although it is not necessary for me to determine that—I am very much, inclined to think I was in error in the first trial of this case when I expressed the opinion that it was proper, after the passage of the Cummins Amendment, to have different rates based on value, the practice followed by the Interstate Commerce Commission in establishing rates based on graded value. I am very strongly inclined to think that that Cummins Amendment intended to stop that entirely, and intended to make the carrier liable for the full value; and that necessarily would take away rates based on values, where the whole consideration for the

lower rate was that there was to be a reduced liability. If the liability was to remain the full value, I don't think there would be a different rate for that special classification.

"Articles might be classed under different tariffs; and I take it different kinds of animals could be classified, draft horses, race horses, brood mares, stallions, etc.—I don't know what the reasonable classification would be—passed on by the Interstate Commerce Commission. I do not think the Amendment intended to deprive the carrier of the right to fix proper rates, based on classification, etc. except in so far as that classification was based upon the actual value of specific, individual things shipped, which was no longer to be permitted in my judgment.

"That conclusion is in accordance with the various decisions. (Citing same.)

51 "On the whole, I am of the opinion there is liability, if at all, for the full value, and that the motion must be overruled in both aspects."

To which action of the court defendant seasonably excepted.

Before the court ruled on the defendant's motion for a directed verdict at the conclusion of all the evidence, the court stated: "I understand it is not insisted that there was any actual fraud or misrepresentation." To which defendant's counsel replied: "If your honor please, no, not involving moral turpitude. We don't claim there was any deception."

In ruling on this motion for a directed verdict, the court said:

MEMORANDUM BY THE COURT.

"The motion last made by the defendant for a directed verdict must be overruled. I see no reason to change my conclusion as to the effect of the Cummins Amendment. And in addition to what I have heretofore said on that point, I overlooked saying that in support of the view that after the adoption of the Cummins Amendment and before the amendment of 1916, there could not be rates based merely upon values, it appears that such an amendment to the Cummins Amendment was actually suggested, and was recommended by the Senate Committee on Interstate Commerce; which recommended an amendment, before the Cummins Amendment was finally passed, which incorporated words giving the Interstate Commerce Commission power to establish rates varying with the value agreed upon, which amendment was not adopted; thus indicating positively, it seems to me, the intention of Congress that such rates should not be permitted under the Cummins Amendment as it was adopted—almost an irresistible inference to that effect from the action of Congress itself.

"On the facts I do not feel that the case is one that should be taken from the jury. There are certain matters that are in dispute that are material one way or the other; such as the question as to where the bodies and horses were scattered after the wreck, and

whether there were ten cross-ties that were badly damaged and taken up, and other matters of that sort, and then the question as to the reasonable inference to be drawn from the facts,—that I
52 do not feel it is a case that should be taken from the jury.

"The motion is accordingly denied."

After argument by counsel upon the facts, the court delivered its charge to the jury, instructing them in regard to the law as applicable to the controverted issues of fact submitted to them. There was no exception by either party to the charge, and no request by either party for any additional instructions; and for that reason the charge is not set forth herein.

The foregoing contains all the evidence and proceedings had on the trial of this cause, except the evidence tending to prove or disprove that the wreck in question in which the horses of plaintiff were killed was proximately caused, or contributed to as a proximate cause, by the negligence of the defendant Adams Express Company and the Railway Company which owned the car in which the horses were shipped, and which was transporting same for the Adams Express Company at the time and place of the wreck.

After the verdict of the jury, and within the time, and in compliance with the rules of the Court, the defendant filed its motion for a new trial, in the following form:

MOTION FOR NEW TRIAL.

"Comes the defendant Adams Express Company, and moves the Court to set aside the verdict of the jury heretofore rendered and grant it a new trial, and assigns the following grounds in support of its motion:

I.

"The Court erred in refusing to grant defendant's motion, made at the conclusion of the plaintiff's testimony, which motion was:

The defendant moves the Court to withdraw and exclude from the consideration of the jury all evidence relating to the question of the value of the horses involved in this suit being contained in the testimony of plaintiff W. W. Darden, E. R. Bradley and K. Spence, on the ground that said evidence tends to vary the terms and provisions of the written contract of shipment introduced by the plaintiff as evidence in this case, and also tends to vary the written terms of the contract prescribed by the Interstate Commerce Commission in the filed and published tariffs under which this shipment was made.

II.

"The Court erred in refusing to grant the defendant's motion, made at the conclusion of plaintiff's evidence, as follows:

"Comes the defendant and moves the court to withdraw and exclude from the consideration of the jury all evidence offered on behalf of the plaintiff tending to show any agreement, understanding

or promise on the part of defendant's agent to furnish the plaintiff with any particular kind of car on any particular date, upon the ground that such evidence tends to vary the terms and provisions of the published tariffs filed with the Interstate Commerce Commission and which govern the shipment in question. This evidence was in the testimony of the plaintiff himself, wherein he testified that the defendant's agent agreed to furnish him with a steel car, etc.

III.

"The Court erred in refusing defendant's motion, made at the conclusion of all the evidence, as follows:

"Comes the defendant and renews its motion, made at the conclusion of the plaintiff's testimony in this cause, to dismiss the plaintiff's suit because the plaintiff had by his own testimony disclosed to the court the illegality in the contract upon which his suit was based, in that it appears that the plaintiff shipped his horses on a valuation which was less than actual value, and resulted in the plaintiff receiving a rebate for the shipment of his horses, contrary to the filed and published tariffs governing this shipment.

IV.

"The court erred in refusing to grant defendant's motion, made at the conclusion of all the evidence, as follows:

"Comes the defendant and moves the court to direct the jury to return a verdict for the defendant, because:

(a) The plaintiff by his own testimony disclosed to the court the illegality in the contract upon which his suit is based, in that it appears the plaintiff shipped his horses on a valuation which was less than actual value, and resulted in the plaintiff receiving
54 a rebate for the shipment of his horses, contrary to the filed and published tariffs governing the shipment.

(b) Because it appears from the plaintiff's declaration, and the evidence offered on behalf of the plaintiff, that he based his suit on an alleged oral contract, entered into between the plaintiff and an agent of the defendant, which oral contract is not permissible under, and is contrary to the published tariffs filed with the Interstate Commerce Commission and is, therefore, illegal and void and cannot be made the basis of a recovery.

(c) Because the contract entered into between the plaintiff and the agent of the defendant, under which the shipment of horses was made, is in violation of the statutes of the United States and therefore, illegal and void and cannot form the basis for a recovery in favor of the plaintiff, in that they are not in accordance with filed and published tariffs such as are required by the statutes governing the transportation of interstate commerce.

(d) Because it appears from the undisputed evidence that the proximate cause of the wreck, and the consequent injury to plaintiff's property, resulted directly from an act of God, to wit: a wind-

storm, and there is no material evidence tending to show any concurring negligence on the part of the carrier, which contributed proximately to the wreck and consequent injury to plaintiff's property."

The Court overruled defendant's motion for a new trial, and pronounced a judgment upon the findings of the jury. To which action of the Court the defendant excepted, and now excepts; and it also excepts to the rulings of the court upon the evidence herein set out, and to the refusal of the court to grant defendant's motion hereinabove set out, and to charge the jury as requested, and to said judgment; and tenders this, its bill of exceptions, to all of said matters, which bill is signed by the trial judge and made a part of the record of this cause.

ORDER SETTLING BILL OF EXCEPTIONS.

The Court also certifies that the foregoing contains the substance of all the evidence and happenings on the trial relating to the questions raised in the assignment of errors, and that a proper
55 assignment of errors was filed the day this bill of exceptions was filed, as required by the rules of the court and the same are made a part of the record.

This March 8, 1922. Edward T. Sanford, U. S. District Judge.

ASSIGNMENT OF ERRORS.

[Filed December 20, 1921.]

In U. S. District Court.

Now comes the defendant, Adams Express Company, by its Attorneys of record and says that in the record of the trial and of the proceedings in this cause in this Court, and in the giving of judgment, and the proceedings for a new trial, there is manifest error in the following particulars:

I. The Court erred in refusing to grant defendant's motion, made at the conclusion of the plaintiff's testimony, which motion was:

The defendant moves the Court to withdraw and exclude from the consideration of the jury all evidence relating to the question of the value of the horses involved in this suit being contained in the testimony of plaintiff W. W. Darden, E. R. Bradley and K. Spence, on the ground that said evidence tends to vary the terms and provisions of the written contract of shipment introduced by the plaintiff as evidence in this case, and also tends to vary the written terms of the contract prescribed by the Interstate Commerce Commission in the filed and published tariffs under which this shipment is made.

II. The Court erred in refusing to grant the defendant's motion, made at the conclusion of plaintiff's evidence, as follows:

56 Comes the defendant and moves the Court to withdraw and exclude from the consideration of the jury all evidence offered

on behalf of the plaintiff tending to show any agreement, understanding or promise on the part of defendant's agent to furnish the plaintiff with any particular kind of car on any particular date, upon the ground that such evidence tends to vary the terms and provisions of the published tariffs filed with the Interstate Commerce Commission and which govern the shipment in question. This evidence was in the testimony of the plaintiff himself, wherein he testified that the defendant's agent agreed to furnish him with a steel car, etc.

III. The Court erred in refusing defendant's motion, made at the conclusion of all the evidence, as follows:

Comes the defendant and renews its motion, made at the conclusion of the plaintiff's testimony in this cause, to dismiss the plaintiff's suit because the plaintiff had by his own testimony disclosed to the Court the illegality in the contract upon which his suit was based, in that it appears that the plaintiff shipped his horses on a valuation which was less than actual value, and resulted in the plaintiff receiving a rebate for the shipment of his horses, contrary to the filed and published tariffs governing this shipment.

IV. The Court erred in refusing to grant defendant's motion, made at the conclusion of all the evidence, as follows:

Comes the defendant and moves the Court to direct the jury to return a verdict for the defendant, because:

(a) The plaintiff by his own testimony disclosed to the court the illegality in the contract upon which his suit is based, in that it appears the plaintiff shipped his horses on a valuation which was less than actual value, and resulted in the plaintiff receiving a rebate for the shipment of his horses, contrary to the filed and published tariffs governing the shipment.

(b) Because it appears from the plaintiff's declaration, and the evidence offered on behalf of the plaintiff, that he based his suit on an alleged oral contract, entered into between the plaintiff and an agent of the defendant, which oral contract is not permissible under, and is contrary to the published tariffs filed with the Interstate Commerce Commission and is, therefore, illegal and void and cannot be made the basis of a recovery.

(c) Because the contract entered into between the plaintiff and the agent of the defendant, under which the shipment of horses was made, is in violation of the statutes of the United States and therefore, illegal and void and cannot form the basis for a recovery in favor of the plaintiff, in that they are not in accordance with filed and published tariffs such as are required by the statutes governing the transportation of interstate commerce.

V. The Court erred in denying this defendant's motion for a new trial.

By reason whereof plaintiff in error, Adams Express Company, prays that the judgment aforesaid may be reversed, etc. Maxwell & Ramsey, Bass & Sims, H. E. Palmer, W. L. Granbery, Attorneys for Defendant.

PETITION FOR WRIT OF ERROR AND ORDER.

In U. S. District Court.

And now comes the said defendant, by Maxwell & Ramsey, Bass & Sims, and W. L. Granbery, its attorneys, and prays the allowance of a writ of error to remove the judgment and proceedings in this cause into the United States Circuit Court of Appeals for the Sixth Circuit, in order that said defendant may obtain a review in said United States Circuit Court of Appeals of said judgment; and the
58 defendant also prays that a citation may issue to said plaintiff, pursuant to the laws of the United States and the rules and practice of this Honorable Court.

Dated March 7, 1922. Maxwell & Ramsey, Bass & Sims, W. L. Granbery, Attorneys for Defendant.

A writ of error in the cause of W. W. Darden vs. Adams Express Co. is hereby allowed, as prayed for in the foregoing petition to operate as a supersedeas and stay of execution. The bond of date March 7, 1922, heretofore filed by defendant, is approved as a supersedeas bond.

Dated, Greenville, Tennessee, March 8, 1922. Sanford, United States District Judge.

DEFENDANT'S PRAECIPE.

(Filed 7th Day of March, 1922.)

In U. S. District Court.

To the Clerk of said Court:

SIR: You will please incorporate into the transcript of the record herein the following portion of the files and records in this suit:

Order.

1. Declaration and amended declaration.
2. Defendant's pleas. (3)
3. Replications of plaintiff.
4. Decree granting new trial.
5. Verdict for plaintiff.
6. Judgment for plaintiff.
7. Order denying motion for new trial.
- 59 8. Memorandum opinion on Defendant's motion for new trial.
9. Appeal bond.
10. Bill of Exceptions.
11. Assignment of Errors.
12. Petition for writ of error, and order for allowance of same.
13. Defendant's praecipe for transcript.

14. All further proceedings relative to the writ of error, and the security given thereon, together with a copy of the citation and the evidence of service, etc.

Dated, 7 day of March, 1922. Yours, etc., Maxwell & Ramsey, Bass & Sims, W. L. Granbery, Attorneys for Defendant.

Copy served upon opposing counsel on the 7th day of March, 1922. K. T. McConnico, Attorney for Plaintiff.

PLAINTIFF'S PRAECIPE.

(Filed March 10, 1922.)

In U. S. District Court.

To the Clerk of said Court:

SIR: You will please incorporate in the transcript of the record herein, the following portion of the files and records in this suit:

1. Order non-suiting as to the Railroad Companies.
2. Opinion of the District Judge granting motion for a new trial on the first trial of the cause.

Dated 10th day of March, 1922. K. T. McConnico, Attorney for Plaintiff.

Copy served upon opposing counsel, this the 10th day of March, 1922. W. L. Granbery, Attorney for Defendant.

60

WRIT OF ERROR.

(Filed March 10, 1922.)

In U. S. District Court.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States:

To the Honorable the Judge of the District Court of the United States for the Middle District of Tennessee, Middle Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between W. W. Darden, plaintiff, and Adams Express Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid,

with all things concerning same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the 7th day of April, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 8th day of March, in the year of our Lord one thousand nine hundred and twenty-two, and of the independence of the United States of America the one hundred and forty-sixth. H. M. Doak, Clerk of the District Court of the United States for the Middle District of Tennessee, by E. L. Doak, Deputy Clerk.

Allowed by Sanford, U. S. District Judge.

Copy of Writ of Error deposited for defendant in error, March 7, 1922.

61

CITATION AND SERVICE.

(Filed March 10, 1922.)

In U. S. District Court.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To W. W. Darden, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the 7th day of April, next, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Middle District of Tennessee, Middle Division, wherein Adams Express Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 8th day of March, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the United States of America the one hundred and forty-sixth. Edward T. Sanford, U. S. District Judge.

Due personal service of a copy of the above citation admitted this 10th day of March, A. D. 1922. K. T. McConnico, Attorney for Defendant in Error.

62

CLERK'S CERTIFICATE.

In U. S. District Court.

UNITED STATES OF AMERICA,
Middle District of Tennessee:

I, H. M. Doak, Clerk of the United States District Court in and for the District aforesaid, do hereby certify that the foregoing is a true, full and complete transcript of the record in the cause of W. W. Darden vs. Adams Express Company, as the same appears and remains on file and of record in my office.

In witness whereof, I have hereunto signed my name and affixed the seal of the said Court at office in Nashville, this the — day of April, 1922. H. M. Doak, Clerk U. S. District Court, by — — —, Deputy Clerk.

63 Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.

APPEARANCE OF COUNSEL.

(Filed April 7, 1922.)

Arthur B. Mussman, Clerk of said Court:

Please enter my appearance as counsel for the Plaintiff in Error. William L. Granbery. Maxwell & Ramsey. Bass & Sims.

CAUSE ARGUED AND SUBMITTED.

(Nov. 15, 1922, before Knappen, Denison, and Donahue, C., JJ.)

This cause is argued by Mr. W. L. Granbery for the plaintiff in error and by Mr. K. T. McConnico for the defendant in error and is submitted to the Court.

64

JUDGMENT.

(Filed Jan. 9, 1923.)

In U. S. Circuit Court of Appeals.

Error to the District Court of the United States for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Tennessee and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed with costs.

OPINION.

(Filed Jan. 9, 1923.)

65

[File endorsement omitted.]

United States Circuit Court of Appeals, Sixth Circuit.

[Title omitted.]

Submitted November 15, 1922; Decided January 9, 1923.

Before Knappen, Denison, and Donahue, Circuit Judges.

KNAPPEN, *Circuit Judge*: On July 7, 1915, while the Cummins' amendment to the Interstate Commerce Act was in force, defendant in error (whom we shall call plaintiff) delivered six horses to the Adams Express Company, at Latonia, Kentucky, for shipment to Windsor, Ontario. The horses were loaded in one end of a car furnished by the Express Company,—the other end being occupied by seven horses owned severally by one Seamster and others. The rate charged by the Express Company was \$165.00 for the car, one-half of which amount was paid by plaintiff and the other half by those who had the other end of the car. In the shipping contract, signed by Seamster, as "owner or duly authorized agent of the owner" (plaintiff not being present), the horses were described as "13 running horses" of a value (which the printed form of contract says was stated by the shipper) of \$100.00 each. The classification minimum rates (as shown by the shipping contract) were
66 stated therein as applicable only when the value of the carload of horses did not exceed \$100.00 for each horse, accompanied by its paraphernalia (such as sulkies, harness, etc.), of a stated additional value. If the value of the shipment exceeded the value so stated an additional charge for such excess, by way of percentage graduated according to first class rates per 100 pounds, was provided for. The Express Company's agent knew that plaintiff's horses were valuable. The tariff rates, if based upon actual values, would greatly exceed those paid. Upon the trial, in response to the court's question whether it was insisted that there was "any actual fraud or misrepresentation," defendant's counsel said "No, not involving moral turpitude. We do not claim there was any deception."¹ Soon after leaving Latonia the car in question was wrecked, and five of plaintiff's horses were killed, by reason of the alleged negligence of the express company largely in providing for the ship-

¹ This concession was properly made. There was no evidence that plaintiff misrepresented the value of his horses, unless in the bare fact that the value of \$100.00 each was given in the shipping contract in the manner above stated;

ment a wooden car alleged to have been old and rotten. On trial to a jury plaintiff recovered verdict and judgment for \$32,500.00, as the value of his horses so killed. In this court the conclusion that such killing was proximately due to the negligence of the express company is not challenged—defendant's sole ultimate contention on the merits being that the shipping contract was wholly void and unenforceable by plaintiff because it involved the giving and acceptance of a rebate from defendant's usual tariff rates, in violation of the provisions of the Interstate Commerce Act.

67 The Carmack Amendment (Act June 26, 1906, C. 3591, 34 Stat. 584), as construed by the Supreme Court, permitted an interstate carrier, by a fair, open and reasonable agreement contained in the shipping contract or bill of lading, to limit the amount recoverable by the shipper to an agreed or conventional value, made for the purpose of obtaining the lower of two or more rates proportioned to the amount of the risk; it being held that such contracts did not contravene the settled principles of the common law preventing a carrier from contracting against its liability for loss by negligence. *Adams Express Co. v. Croninger*, 226 U. S., 491; *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, 475; *Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 283. And until the passage of the Cummins' Amendment (Act Mar. 4, 1915, C. 176, 38 Stat. 1196) it was the lawfully established practice of interstate carriers to provide by their tariffs for limitation of the amount of liability corresponding to the rate paid. The Cummins' amendment, however, declared that the interstate carrier "shall be liable to the lawful holder of said receipt or bill of lading, or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it * * * notwithstanding any limitation of liability or limitation of the amount of recovery, or representation or agreement as to value in any such receipt or bill of lading or in any contract, rule or regulation, or in any tariff filed with the inter-

nor was there any direct evidence that plaintiff knew he was paying less than the proper tariff rates, except as he is legally bound to know the published rates. He testified, without dispute, that the express company's agent solicited the transportation on the race track "and around the stables," knew plaintiff's horses and that they were entered in races in Canada (as above stated, they were described in the shipping contract as "running horses"), quoted the rate of \$165.00 per car and no other rate; that plaintiff knew of no other express rate than the car rate (he had shipped these horses by freight from Nashville to Louisville under a "limited liability" contract, but said he paid more for shipment by express than by freight, that he had not "waived any of his rights for value" and understood that he was getting a "higher protection"); that no valuation was given by him or asked for, that no tariffs were shown him and no written contract seen or signed by him, that he authorized no one to sign a contract for him, and that the men in charge of the horses did not know their value; that plaintiff had left for Nashville after arranging for the shipment and before it was made. The charge to the jury was not sent up, for the reason that neither party excepted to it or asked for additional instructions. While some of the above testimony was objected to, no error is assigned in this court upon its admission.

It is perhaps important only as it repels intentional fraud on plaintiff's part.

state commerce commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void."²

68 Defendant properly concedes that the effect of the Cummins' amendment was to prohibit a limitation upon the amount of the carrier's liability in case it is liable at all (Chicago, Etc. Ry Co. v. McCaull-Dinsmore Co., 253 U. S. 97, 100, 33 I. C. C. 682, 693); and that no such attempted limitation is found in the contract before us, which was made while the Cummins' amendment was in force. The situation as respects the contract in this case is not changed or affected by the second Cummins' amendment (Act Aug. 9, 1916, C. 301, 39 Stat. 441—passed more than a year after the making of the contract and shipment here in question) which second amendment excepts from the prohibition against limitation of liability "property, except ordinary livestock, received for transportation, concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing, as the released value of the property," etc. As said by the Supreme Court in Chicago Etc. Ry Co. v. McCaull-Dinsmore Co., supra, at p. 100 (in construing the clause of the Cummins' amendment which we have quoted, as applied to the basis and measure of recoverable damages for failure to deliver): "Neither the convenience of the clause, nor any argument based upon the history of the statute or upon the policy of the later act of Aug. 9, 1916, C. 301, 39 Stat. 441, can prevail against what we understand to be the meaning of the words."³

It remains to consider whether the mere giving and receiving of rebate from the applicable tariff rate rendered the contract of shipment here in question void and unenforceible. Defendant's argument in that respect is briefly that such giving or acceptance of rebates was, by the act in force when the shipment was had, 69 made unlawful, and subjected both the carrier and the shipper to penalty therefor; and that the case is therefore governed by the general rule that an illegal contract will not be enforced by the courts.

Whether or not the contract of shipment is non-enforceible depends upon the public policy of the United States in that respect, as evidenced by its statutes and the decisions of its courts. While the statute makes all rebating, and contracts therefor, unlawful and unenforceible, it is to be noted that notwithstanding the fact that re-

²The amendment contained a proviso permitting the carrier to require the shipper specifically to state the value of the goods when hidden from view by wrapping, boxing or other means, and relieving the carrier from liability beyond the amount so stated. But this proviso has, of course, no relation to the case under consideration.

³We have assumed, for the purposes only of this opinion, but without so deciding, that it was competent for defendant to make varying rates for carriage, dependent upon the value of the shipment so long as no attempt was made to limit liability below the actual loss, damage or injury suffered.

bating has been forbidden for the past 35 years, and notwithstanding the numerous amendments of the original act, the statute has never declared the contract of carriage unenforceable by reason of rebating, or the carrier thereby absolved from liability for negligent failure to deliver. The statute in force when the shipment in question was made provided drastic remedies and penalties for rebating. Not only were both carrier and shipper made liable to criminal punishment, but the shipper was made liable to the United States for three times the amount of the rebate received or accepted. More than this, a carrier, at least when not in default, is entitled to recover from the shipper any deficiency of rates paid below the legal tariff rates. Congress presumably believed that public policy, evidenced by the statutes enacted, as has frequently been declared, in the interest of the shipping public, would be best subserved by holding the carrier liable for the value of the shipment lost or destroyed through its negligence, notwithstanding a violation of the provisions against rebating, for which specific penalties and remedies were otherwise provided. It is now well settled that when a statute imposes specific penalties for its violation, where the act is not *malum in se*, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the legislative intent to render such contracts illegal and unenforceable. *Harris v. Runnels*, 12 How. 79, 84, et seq.; *Farmers' & Mechanics' Bank v. Deering*, 91 U. S. 29, 35; *Fritts v. Palmer*, 132 U. S. 282, 289, 293; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 545; *Yates v. Jones National Bank*, 206 U. S. 158, 179; *Dunlop v. Mercer* (C. C. A. 8) 156 Fed. 545, 555. This rule is not in conflict with, but is an exception to the general rule that an action cannot be maintained upon an illegal contract.⁴

Harris v. Runnels, *supra*, was a suit upon a note given upon a sale made in violation of the statute. *Bank v. Deering*, *supra*, was a suit upon a note whose usurious character was set up in defense. *Fritts v. Palmer* was an action of ejectment, the defense being that plaintiff violated the laws of the state when it purchased the property in question. *Connolly v. Union Sewer Pipe Co.*, *supra*, was a suit for the purchase price of goods sold, against a defense of sale in pursuance of an illegal combination. Moreover, in the instant case plaintiff planted its right to recover not on defendant's liability as an insurer, but on its positive and proximate negligence largely in making the shipment in question in a wholly unfit car. Defendant

⁴ In *Dunlop v. Mercer*, *supra*, at p. 555, Judge Sanborn used this language: "The general rule that an illegal contract is void and unenforceable is, however, not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the law-making power"; citing *Harris v. Runnels*, *supra*; *Fritts v. Palmer*, *supra*, and numerous other cases.

ant, having accepted plaintiff's horses for transportation as a common carrier, became a bailee thereof, and cannot escape liability for its own negligence while in possession of the horses on the ground that the original contract of carriage was illegal. Direct authority in support of the conclusion below is not wanting. In *Merchants, Etc. Co. v. Insurance Co.*, 151 U. S. 368, which involved the loss by fire of cotton shipped by rail, it was sought, by proof on the trial, to show that special rates, rebates or drawbacks had been given in violation of the interstate commerce laws and regulations. It was held, on error to a state court, that there was nothing in the interstate commerce law which vitiates bills of lading or which by an allowance of rebates, if actually made would invalidate the contract of affreightment, or exempt the railroad company from liability on its bills of lading. The court (pp. 387-388) quoted with approval the holding of the state supreme court that assuming "that the law

71 was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received * * * The law makes such agreements as to rebate, etc., void, but it does not make the contract of affreightment otherwise void, and we think there is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability when it made such contract in connection with that for receipt and transportation of freight. Such a contract would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract as to rebate would be void * * * and could not be enforced; but we think the shipper could nevertheless recover for loss of his freight through the carrier's negligence * * * No different construction has yet been put upon the interstate commerce law so far as we are advised, and we decline to give it any other." The Supreme Court added its own express statement as follows: "There is nothing in the Interstate Commerce Law which vitiates bills of Lading, or which, by reason of such allowance * * * if actually made, would invalidate the contract of affreightment or exempt the railroad company from liability on its bills of lading." True, this decision was concerned with the original interstate commerce act of 1887 (Feb. 4, 1887; 24 St. C. 104, pp. 379 et seq.), which did not punish the shipper for accepting or receiving rebates; but it did, in express terms, prohibit unjust discrimination in rates, declared such discrimination unlawful, required the carrier to file copies of its schedules of rates, made it unlawful for the carrier to charge, collect or receive a greater or less compensation than provided in the published schedules, and for wilful violation of the act made the carrier guilty of a misdemeanor. Plainly, therefore, such rebates were then not only contrary to the public policy of the United States, but were positively illegal (see *Armour v. United States*, 209 U. S. at p. 69). That the shipper was not punishable does not alter the case in this respect.

72 We are not cited to, nor have we found, any decision of the Supreme Court which, in our opinion, as applied to the

facts of the instant case, contravenes or discredits the decision in the cotton compress case just cited.⁸

It results from the views we have expressed that the action of the trial court in denying defendant's motions to strike out certain of the testimony was either not erroneous or non-prejudicial. The evidence of the value of the horses was not incompetent because different from that stated in the written shipping contract. The Cummins' amendment imposed liability for full value "notwithstanding any * * * agreement as to value * * * in any contract." The evidence of defendant's agreement to furnish a different kind of car was pertinent to the question of negligence. As payment of an insufficient rate did not make the contract unenforceable, the motions to direct verdict were properly denied. The denial of motion for new trial was addressed to the discretion of the trial court.

In our opinion the judgment of the district court was right and should be affirmed.

PETITION FOR WRIT OF ERROR.

[Filed Jan. 27, 1923.]

In U. S. Circuit Court of Appeals.

And now comes the said plaintiff in error, by Maxwell & Ramsey, Bass & Sims, and W. L. Granbery, its attorneys and prays the allowance of a writ of error to remove the judgment and proceedings in this cause into the Supreme Court of the United States, in order that said plaintiff in error may obtain a review in said Supreme Court of the United States of said judgment; and states that this cause is one which arises under "an Act of the Congress of the United States of America entitled 'An Act to Regulate Commerce' passed February 4, 1887, and other Acts of said Congress amendatory thereof, and particularly an Act passed March 4, 1915"; that it is a cause in which the judgment of the United States Circuit Court of Appeals for the Sixth Circuit is not final, but is a proper case to be reviewed by the

⁸ The cases cited by defendant as declaring (or perhaps intimating) a different rule are not, in our opinion, in point. For example: In *Chicago & Alton Ry. v. Kirby*, 225 U. S. 135, 106, the special contract sued upon was for an expedited service, for which no rates existed, and the contract was for that reason illegal. "There was no count based upon the carrier's liability for negligence in not promptly shipping and delivering. The judgment was rested upon the damages resulting from a breach of the special contract, and not at all upon the liability of the carrier otherwise." *Missouri, K. & T. Ry. Co. v. Harriman*, 227 U. S. 657, 671; *Kansas City Southern Ry. Co. v. Carl*, *ibid.* 639, 671, and *Gt. Northern Ry. v. O'Connor*, 232 U. S., at p. 515, were cases of alleged undervaluation for the purpose of obtaining the lower of two published rates, previous to the Cummins' amendment, the effect of which had already been declared in *Wells, Fargo & Co. v. Nleman-Marcus Co.*, 227 U. S. 469, 475, to be that the shipper was estopped, by its misrepresentation, to recover more than the value declared to obtain the rate. Neither of the cases involved rates.

Supreme Court of the United States on writ of error; and the plaintiff in error also prays that a citation may issue to said defendant in error, pursuant to the laws of the United States and the rules and practice of this Honorable Court.

Dated January 29th, 1923. Maxwell & Ramsey, Bass & Sims, William L. Granbery, Attorneys for plaintiff in Error.

ORDER ALLOWING WRIT OF ERROR.

In U. S. Circuit Court of Appeals.

A writ of error in the cause of Adams Express Company, Plaintiff in Error vs. W. W. Darden, Defendant in Error, is hereby allowed, as prayed for in the foregoing petition, to operate as a supersedeas and stay of execution. The bond of date March 7, 1922, heretofore filed by Plaintiff in Error, is approved as a supersedeas bond.

Grand Rapids, Michigan.

Dated January 29, 1923. Loyal E. Knappen, United States Circuit Judge.

ASSIGNMENT OF ERRORS.

[Filed Jan. 27, 1923.]

In U. S. Circuit Court of Appeals.

Now comes the plaintiff in error, Adams Express Company, by its attorneys of record and says that in the record and the proceedings in this cause in this Court, there is manifest error in the following particulars:

I. The United States Circuit Court of Appeals for the Sixth Circuit erred in refusing to reverse the action of the trial Court in denying plaintiff in error's motion, made at the conclusion of the

75 plaintiff's testimony, which motion was:

The defendant moves the court to withdraw and exclude from the consideration of the jury all evidence relating to the question of the value of the horses involved in this suit being contained in the testimony of plaintiff W. W. Darden, E. R. Bradley and K. Spence, on the ground that said evidence tends to vary the terms and provisions of the written contract of shipment introduced by the plaintiff as evidence in this case, and also tends to vary the written terms of the contract prescribed by the Interstate Commerce Commission in the filed and published tariffs under which this shipment is made.

II. The said Court also erred in refusing to reverse the action of the trial Court in denying plaintiff in error's motion, made at the conclusion of the plaintiff's evidence, which motion was:

Comes the defendant and moves the Court to withdraw and exclude from the consideration of the jury all evidence offered on behalf of

the plaintiff tending to show any agreement, understanding or promise on the part of defendant's agent to furnish the plaintiff with any particular kind of car on any particular date, upon the ground that such evidence tends to vary the terms and provisions of the published tariffs filed with the Interstate Commerce Commission which govern the shipment in question. This evidence was in the testimony of the plaintiff himself, wherein he testified that the defendant's agent agreed to furnish him with a steel car, etc.

76 III. The said Court also erred in refusing to reverse the action of the trial court in denying plaintiff in error's motion, made at the conclusion of all the evidence, which motion was:

Comes the defendant and renews its motion, made at the conclusion of the plaintiff's testimony in this cause, to dismiss the plaintiff's suit because the plaintiff had by his own testimony disclosed to the Court the illegality of the contract upon which his suit was based, it that it appears that the plaintiff shipped his horses on a valuation which was less than actual value, and resulted in the plaintiff receiving a rebate for the shipment of his horses, contrary to the filed and published tariffs governing this shipment.

IV. The said Court erred in refusing to reverse the action of the trial court in denying plaintiff in error's motion, made at the conclusion of all the evidence, which motion was:

77 Comes the defendant and moves the Court to direct the jury to return a verdict for the defendant, because:

(a) The plaintiff by his own testimony disclosed to the court the illegality in the contract upon which his suit is based, in that it appears the plaintiff shipped his horses on a valuation which was less than actual value, and resulted in the plaintiff receiving a rebate for the shipment of his horses, contrary to the filed and published tariffs governing the shipment.

(b) Because it appears from the plaintiff's declaration, and the evidence offered on behalf of the plaintiff, that he based his suit on an alleged oral contract, entered into between the plaintiff and an agent of the defendant, which oral contract is not permissible under and is contrary to the published tariffs filed with the Interstate Commerce Commission and is, therefore, illegal and void and cannot be made the basis of a recovery.

(c) Because the contract entered into between the plaintiff and the agent of the defendant, under which the shipment of horses was made, is in violation of the statutes of the United States and therefore, illegal and void and cannot form the basis of a recovery in favor of the plaintiff, in that its terms are not in accordance with filed and published tariffs such as are required by the statutes governing the transportation of interstate commerce.

V. The said Court erred in refusing to reverse the action of the trial court in denying plaintiff in error's motion for a new trial.

VI. The said Court erred in its written opinion in this cause, in holding that public policy required the enforcement of an illegal shipping contract, expressly made unlawful by the act of Congress.

78 VII. The said Court also erred in holding that a shipper may set up an interstate commerce shipping contract, prove its unlawfulness in making out his case, and then recover under it.

VIII. Said Court also erred in holding oral evidence could be admitted to vary the terms of the written contract, required by the Act of Congress and prescribed by the Interstate Commerce Commission on an interstate shipment.

IX. Said Court also erred in not holding that, since the Supreme Court has held the Commerce Act prohibiting rebating and unjust discrimination was for the protection of the general shipping public, a particular shipper cannot enforce a contract in which a rebate is disclosed, but such shipper will be repelled from court because of the illegality in his contract.

By reason whereof plaintiff in error, Adams Express Company, prays that the judgment aforesaid may be reversed, etc. Maxwell & Ramsey, Bass & Sims, William L. Granbery, Attorneys for Plaintiff in error.

79 [File endorsement omitted.]

WRIT OF ERROR.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals for the Sixth Circuit before you, between Adams Express Company, plaintiff in error, and W. W. Darden, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 26th day of February, next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 29th day of January, in the year of our Lord one thousand nine hundred and twenty-three, and of the independence of the United States of America the one

hundred and forty-seventh. Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. [Seal of United States Circuit Court of Appeals, Sixth Circuit.]

Allowed by Loyal E. Knappen, United States Circuit Judge.

Copy of Writ of Error deposited for defendant in error, January 29th, 1923.

81 [Endorsed:] Lodged with me January 29, 1923. L. E. Knappen, United States Circuit Judge.

82 **CITATION AND SERVICE.**

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To W. W. Darden, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, in the District of Columbia, on the 26th day of February, next, pursuant to a Writ of Error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit, wherein Adams Express Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 29th day of January, in the year of Our Lord one thousand nine hundred and twenty-three, and of the Independence of the United States of America the one hundred and forty-seventh. Loyal E. Knappen, United States Circuit Judge.

Due personal service of a copy of the above citation admitted this 30th day of January, 1923. K. T. McConnico, Attorney for Defendant in Error.

83 [Endorsed:] Filed Feb. 1, 1923. Arthur B. Mussman, Clerk. Lodged with me January 29th, 1923. L. E. Knappen, United States Circuit Judge.

84 **PRAECIPE FOR TRANSCRIPT.**

[Filed Feb. 3, 1923.]

In U. S. Circuit Court of Appeals.

In this cause it is stipulated by and between counsel for plaintiff in error, Adams Express Company, and defendant in error, W. W. Darden, that the transcript of record for the United States Supreme

Court on Writ of Error in this cause shall contain the entire record and proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.

February 2, 1923. William L. Granbery, Attorney for Plaintiff in Error. K. T. McConnico, Attorney for Defendant in Error.

ORDER RE ORIGINAL PAPERS.

[Filed Feb. 6th, 1923.]

In U. S. Circuit Court of Appeals.

It being made to appear to the court that writ of error will be prosecuted to the Supreme Court of the United States in this cause, it is ordered by the court that the original papers accompanying the record from the court below shall be forwarded by the clerk of this court to the clerk of the Supreme Court of the United States at Washington, for the inspection of the court, if it shall so desire; the same to be returned to the District Court at Nashville, Tennessee, after the disposition of this case in the Supreme Court.

CLERK'S CERTIFICATE.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Adams Express Company vs. W. W. Darden, No. 3712, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 16th day of February, A. D. 1923. Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. [Seal of United States Circuit Court of Appeals, Sixth Circuit.]

Endorsed on cover: File No. 29,415. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 865. Adams Express Company, plaintiff in error, vs. W. W. Darden. Filed February 20th, 1923 File No. 29,415.

226
No. 885

U. S. Supreme Court, U. S.
FILED

APR 3 1923

WM. H. STANSBURY
CLERK

IN THE
United States Supreme Court

OCTOBER TERM, 1922

ADAMS EXPRESS COMPANY, *Petitioner*

vs.

W. W. DARDEN, *Respondent*

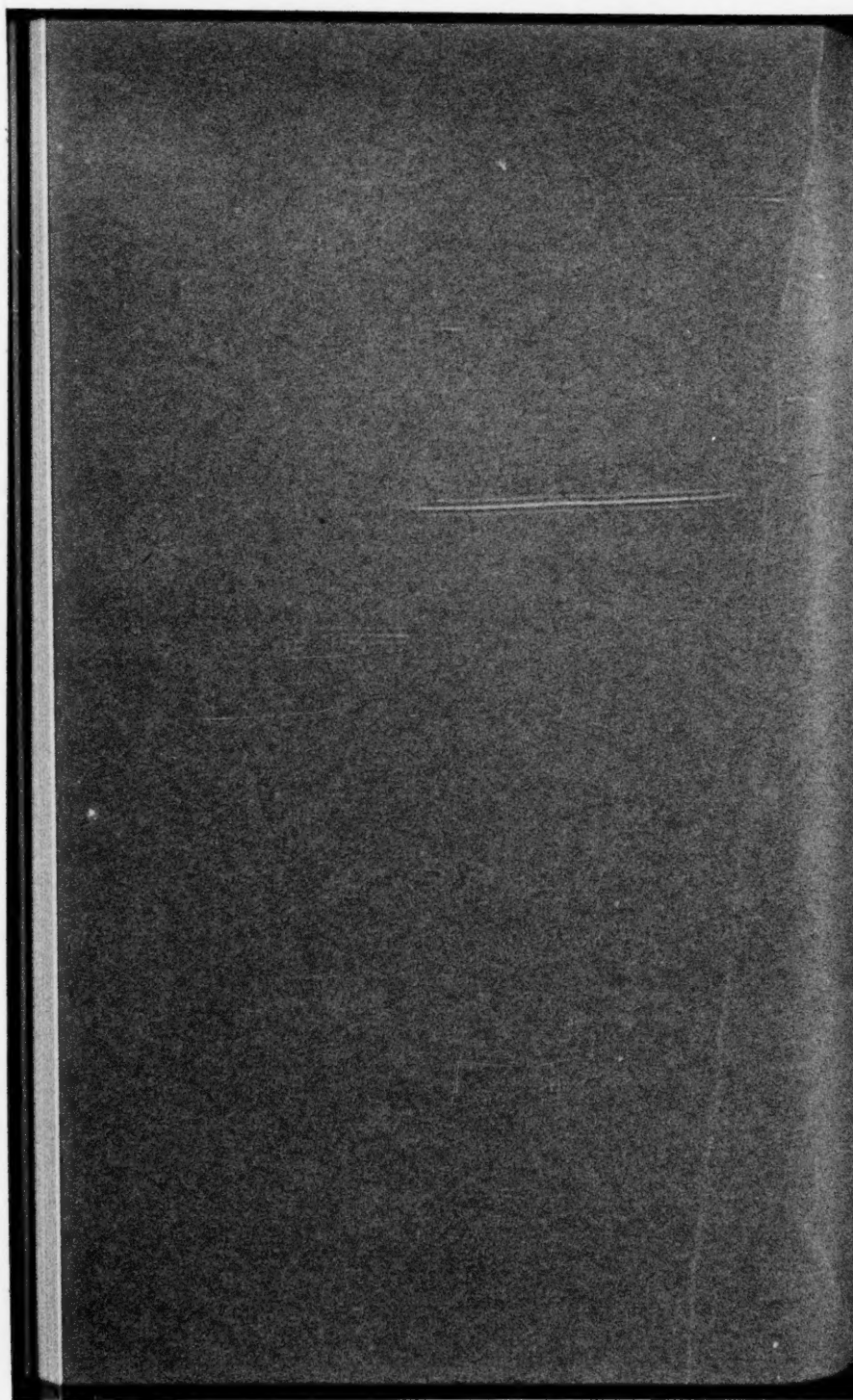
PETITION OF ADAMS EXPRESS COMPANY FOR WRIT OF
CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MAXWELL S. HANNEY,

SON & SON,

WILLIAM L. GRANT,

Attorneys for Petitioner



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IN THE
United States Supreme Court

OCTOBER TERM, 1922

ADAMS EXPRESS COMPANY, *Petitioner*

vs.

W. W. DARDEN, *Respondent*

PETITION OF ADAMS EXPRESS COMPANY FOR WRIT OF
CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your petitioner, Adams Express Company, respectfully represents to the Court that it is a common carrier for hire, and was engaged in the express business on July 7, 1915, when the defendant shipped some race horses from Latonia, Kentucky, to Windsor, Canada, under a contract prescribed by the Interstate Commerce Commission and made a part of the filed and

published tariffs. Some of the horses were destroyed on a train on one of the railroads transporting the shipment, and upon a trial in the District Court for the Middle District of Tennessee, a jury found the shipment was lost through negligence, and assessed the damage at \$32,500.00.

The case in the District Court, aside from negligence, turned upon questions arising under the Interstate Commerce Act, and its various amendments. In the Circuit Court of Appeals, the case was determined upon the same questions, but for somewhat different reasons.

Since the case involves *solely* questions arising under the Commerce Act, and has been so determined in both courts, petitioner believed it belongs to that class of cases in which the judgment of the Circuit Court of Appeals is not made final, and therefore a writ of error has been sued out in this Court to the Circuit Court of Appeals for the Sixth Circuit; and a certified copy of the record and proceedings in the trial court and in the Circuit Court of Appeals has been filed with the Clerk of this Court, and is now pending as No. 865 of the October Term, 1922.

Petitioner, doubting whether the face of the plaintiff's declaration sufficiently discloses the jurisdiction of the District Court rested upon questions arising under the Commerce Act, as well as diverse citizenship, files this petition for *certiorari*, in order that this Court may certainly have jurisdiction to review and determine the important public questions presented on the record in both Courts, and arising under the Commerce Act.

The material facts are:

An *experienced* shipper sued a carrier for property

lost in transit, and among other defenses, the carrier objected to oral evidence varying the terms of the shipping contract, required by statute, prescribed by the Commerce Commission, and made a part of the filed and published tariffs. The shipment consisted of race horses; the value stated in the contract was \$500.00, and the shipper was allowed to say they were worth more than \$50,000.00, to recover a judgment in excess of the rate-fixing value.

In the absence of oral testimony, the shipper is entitled to recover the value of the horses stated in the shipping contract; however, allowing such oral evidence, and thus contradicting the value stated in the shipping contract, and on which the transportation charge was based, makes the shipper disclose the illegality in the contract. This evidence disclosed giving and receiving a rebate in violation of the Commerce Act and the filed and published tariffs under which the shipment was made,—the “device” resorted to being to undervalue the shipment and apply the rate to this undervaluation, instead of to actual value, as required by the filed tariffs and Act of Congress.

The inquiry, therefore, is whether a shipper may vary by parol evidence the written terms of a shipping contract required by law, and prescribed by the Commerce Commission, “for the purpose of enabling the shipper to obtain a recovery in excess of the maximum valuation” stated in the contract; and, if such evidence, when admitted, shows the shipper received a rebate in clear violation of law, can such “illegal” contract be enforced for his benefit.

Both these questions were determined in the affirmative by both Courts, contrary to the decisions of this Court, as Petitioner respectfully insists.

This *experienced* shipper, for twenty years "had shipped and raced horses to and on practically all the tracks in the United States was familiar with the way and manner in which it was then customary to ship throughbred horses by express"; had *knowingly* shipped those particular horses within the preceding three months "under a limited liability contract," limiting his recovery to a small amount in the event of loss. (Trans., p. 16.)

The shipment was started at Latonia, Kentucky, on July 7, 1915, and this *experienced* shipper arranged with the carrier's agent on July 6th for one half of a car, gave his check for \$82.50 (the minimum value rate) to his trainer, to be given to "whoever was going to pay for the car," and left the city.

His trainer says, that while he did not *sign* this shipping contract, he was present when it *was* signed (Trans., pp. 21-22). The shipping contract (Trans., p. 22), the order of the Commission (Trans., p. 29), and the tariffs (Trans., p. 27), *required* the actual value of the shipment to be stated, to ascertain and apply the correct rate; and the shipping contract, required by law and prescribed by the Commerce Commission, also shows the rate to be charged—1% of value in excess of \$100.00 for each horse. (Trans., p. 23.)

The shipper says the value of a race horse depends upon "earning ability, breeding, disposition and soundness"; that no one can even approximately value a race horse who hasn't "a practical knowledge of racing and race horses." (Trans., p. 19.) "A race horse, after being trained and developed that cannot run and win races is worth no more than an ordinary horse." (Trans., p. 21.)

When the shipper first offered oral evidence of a contract, the carrier objected (Trans., p. 18); and, contrary to the terms of the shipping contract, he was permitted by the Court to value his horses, Dortch, \$25,000; Little Father, "anywhere from \$12,500 to \$15,000"; Margaret D., "\$5,000 to \$6,000"; Red Coat, "\$7,500 to \$9,000"; Green Horn, \$2,000. (Trans., p. 20.) In the shipping contract, these horses were valued at \$500.00.

It thus appears an *experienced* shipper, "familiar with the way and manner in which it was then customary to ship thoroughbred horses by express," had his horses, worth, he says, more than \$50,000, shipped on a value of \$500.00, to secure the minimum rate of \$82.50, when he should have paid, under the tariffs, more than \$500.00; and, in this way, obtained a rebate declared to be "unlawful" by Act of Congress, and expressly forbidden in the filed tariffs.

This *experienced* shipper knew the carrier's agent could not correctly value his horses, and he left a check for only \$82.50, the minimum value charge, to pay for their transportation, with his trainer, who did not know their value (Trans., p. 19). While the express agent, in plain violation of the filed tariffs, did not attempt to ascertain the correct value of the shipment, yet this *experienced* shipper knew these horses were not to be valued at their worth, *and that the express agent could not obtain their correct value in the absence of the owner.*

The trial judge not only allowed the written contract to be varied by parol evidence, "for the purpose of enabling the shipper to obtain a recovery . . . in excess of the maximum valuation" stated in this contract, but held such an experienced shipper could

undervalue his property to secure a low rate, and then recover full value, when loss occurred, although such conduct violated the filed and published tariffs (Trans., p. 38). This holding followed, Petitioner respectfully submits, an untenable construction of the Act of March 4, 1915 (38 Stat. 1196), called the "Cummins Amendment," which merely forbids a carrier limiting by contract the *amount* of its liability, and does not repeal the provisions of the Commerce Act making it "unlawful" to give, or accept a rebate, or depart from the filed and published tariffs. (Appendix, p. 26.)

And the Circuit Court of Appeals held "the mere giving and receiving of rebate from the applicable tariff rate" did not render "the contract of shipment here in question void and unenforcible Whether or not the contract of shipment is nonenforcible depends upon the public policy of the United States in that respect, as evidenced by its statutes and the decisions of its courts." (Trans., p. 50.)

Moreover, both Courts held the written shipping contract, required by law, prescribed by the Commerce Commission, and made a part of the tariffs, could be varied by parol evidence, "for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation" stated in the contract to ascertain the applicable rate.

Construing the "Cummins Amendment" as an *amendment* of the Commerce Act, as it is, and therefore not repealing the "prime purpose" of the Act, it will be seen the amendment merely prohibits a carrier limiting by contract, the *amount* of its liability, in the event of liability.

The "broad language" of the "Carmack Amend-

ment" was construed in *Express Company vs. Croninger*, 226 U. S. 508, not to change the common law rule of liability, but as merely preventing the carrier *limiting*, by contract, its liability to a point *short of destination*.

The "Cummins Amendment," in amending the "Carmack Amendment," uses the same "broad language," but does not change the common law rule of liability, and, as stated, merely prohibits a carrier *limiting*, by contract, the *amount* of its liability, in the event of liability. Congress could not have intended to allow shippers to undervalue shipments to secure a rebate from the filed tariffs, and then reward them with recoveries for much larger sums.

It thus appears one Court holds Congress has by an amendment, substantially destroyed, if it has not actually repealed, the "prime purpose" of the Commerce Act; while the other Court holds this "public policy" is *promoted* by aiding shippers and carriers in doing the very thing the law makes "unlawful" and prohibits.

"Limited liability contracts" were prohibited by the "Cummins Amendment" for certain classes of property, and the Commerce Commission thereupon revised the tariffs. If the carrier could no longer limit the amount of its liability, the shipper could no longer have a reduced rate. Liability and rate go together; full liability obviously carries with it a corresponding rate for the carriage and insurance; and this is the view expressed by the Commerce Commission.

In re: Cummins Amendment, 33 I. C. C. 682.

The Commerce Commission accordingly *required* the shipper to state, not merely a "shipping" value, but "actual value," so the correct rate could be

ascertained and applied. The carrier's agent and the shipper *ignored* this requirement, so the shipper might get a reduced rate—a rebate, in plain violation of the law; and to enforce this agreement for the benefit of this shipper, allows him to obtain the very preference over other shippers which is the “prime purpose” of the Commerce Act to prevent.

In this case the shipper could not avoid disclosing his illegal conduct to the court; it is the foundation of his recovery. After finding the property was destroyed by the carrier's negligence, the next question was the amount of, or measure of damages. To increase the *amount* of damage, the shipper was compelled to vary the terms of the shipping contract by evidence aliunde, and, in doing so, disclosed to the court his “unlawful” conduct.

The shipper obtained \$32,000.00 *more* by showing his “unlawful” conduct than he would have obtained without such disclosure. The maximum fine that could be imposed upon the shipper for this “unlawful” conduct is \$20,000.00 (32 Stat. 847). Moreover, to hold the fine exclusive, ignores the wording of the Act, saying “it shall be unlawful,” and not merely saying, “it is prohibited.” That which the statute says shall be “unlawful” leaves no discretion in the Court to interpret the “public policy” involved—the Act itself has determined that.

Petitioner, therefore, respectfully submits that neither a construction of the “Cummins Amendment,” nor the “public policy” involved, justifies the enforcement of contracts expressly declared to be “unlawful,” because contrary to the “prime purpose” of the Commerce Act; nor may an *amendment* to the Commerce

Act be construed to destroy the "prime purpose" of the Act it amends; nor may a Court substitute its judgment of what may promote the "public policy" of a statute, when the statute itself has expressly denounced the conduct as "unlawful," and not merely prohibited it; nor should a Court aid a shipper or carrier in doing the very thing the statute makes "unlawful."

The trial Judge believed the "Cummins Amendment" forbids rates varying with value; that the *same* rate must be charged by the carrier for transporting and insuring the most valuable and the least valuable race horse; that the owner of a race horse which cannot "race," and therefore worth no more than an ordinary horse, must pay the *same* amount as the owner of "Man O' War." The Court of Appeals assumes, for the argument only, this to be an incorrect construction of the "Cummins Amendment." Petitioner respectfully insists such a construction of a mere amendment to the Commerce Act should not be sustained, since it brings the statute in conflict with what this Court said in *Express Co. vs. Croninger*, 226 U. S. 508, that a carrier has the inherent right to receive a compensation commensurate with the risk; it is clear Congress had no purpose to impose such a hardship on carriers or shippers, and the history and purpose of the amendment forbids such a construction.

This Court has refused a right of action for injuries negligently inflicted upon one riding free, but by permission, on an interstate train, in violation of the Act of Congress making it "unlawful" to do so.

Illinois Central vs. Messina, 240 U. S. 394.

Petitioner submits the same principle of law must

be applied to "unlawful contracts" for the carriage of freight.

In *American Ry. Express Co. vs. Lindenburg*, decided January 8, 1923, this Court, following *Kansas City So. Ry. vs. Carl*, 227 U. S. 639, says:

"To permit such a declared valuation to be overthrown by evidence aliunde the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations, and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies."

If a carrier's agent *imposes* upon an *innocent* shipper, and thereby induces him to enter into a contract made "unlawful" by the Commerce Act, he *may* sue the carrier under Section 8 of the Commerce Act, but can have no relief on the "unlawful" contract.

24th Stat. 382;

Penn. R. Co. vs. Jacoby & Co., 242 U. S. 89.

Petitioner therefore respectfully submits that the questions presented for consideration are of importance to shippers and carriers alike, and are of great public interest.

A brief of the pertinent authorities is annexed for the convenience of the Court.

Wherefore your Petitioner respectfully prays that a writ of *certiorari* may be issued out of, and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, to the end that

the cause of Adams Express Company, Plaintiff in Error, vs. W. W. Darden, Defendant in Error, may be reviewed and determined by this Court, as provided in Section 240 of the Judicial Code, and that your Petitioner may have such other and further relief or remedy in the premises as this Court may deem proper; and that the said judgment and decree of said Circuit Court of Appeals be reversed by this honorable Court; and that if necessary another transcript of the record and all proceedings of the Circuit Court of Appeals may be directed to be filed in this Court, unless your Honors deem the present record now pending in this Court sufficient.

And your Petitioner will ever pray, etc.

ADAMS EXPRESS COMPANY,

By MAXWELL & RAMSEY,

BASS & SIMS,

WILLIAM L. GRANBERY,

Attorneys for Petitioner.

STATE OF TENNESSEE }
DAVIDSON COUNTY. } ss.

William L. Granbery, being duly sworn, says that he is one of the attorneys for Adams Express Company, the petitioner above named, and, as such, has had personal knowledge of the cause mentioned in the foregoing petition from the time of its inception; and that the facts stated in this petition are true to the best of his information and belief.

WILLIAM L. GRANBERY.

Sworn to and subscribed before me, this the 14th day of March, 1923.

O. B. HOFSTETTER, *Notary Public*.

(SEAL)

BRIEF.

The Interstate Commerce Act Makes Rebating Unlawful.

The original Commerce Act of February 4, 1887 (24 Stat. 379) made it unlawful for a *common carrier* to deviate from the published rates and charges.

The amending Act of March 2, 1889 (25 Stat. 857) made the *shipper*, who knowingly and wilfully obtained transportation at less than the regular rate, guilty of fraud.

The amending Act of February 19, 1903 (32 Stat. 847—the Elkins Act), made the failure of the carrier to file and publish, or strictly observe the tariffs, a misdemeanor; and “it shall be unlawful for any person . . . to accept or receive any rebate . . . where- by any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs;” and any person who accepts or receives such rebate shall be guilty of a misdemeanor and punished.

The imposition aimed at in the Act of March 2, 1889, “was principally such as might be practiced by the shippers upon the carriers in order to procure the preference.” But the purpose of the Act of February 19, 1903, was “to reach all means and methods by which the unlawful preference of rebate, concession, or discrimination is offered, granted, given or received;” and was not limited to “the obtaining of such prefer- ences by *fraudulent* schemes or devices, or to those operating only by *dishonest, underhanded* methods.” And “this Act is not only to be read in the light of the previous legislation, but the purpose which Congress

evidently had in mind in the passage of the law is also to be considered."

Armour Packing Co. vs. U. S., 209 U. S. 69;
U. S. vs. Union Mfg. Co., 240 U. S. 610.

The Purpose of Congress.

The purpose of Congress was to require equal treatment to all shippers, having but one rate to every one for similar services; to require filing and publication to secure public knowledge of rates to be charged, to prevent departures from rates filed with the Commission through oral agreements, special contracts or other "devices;" to prohibit all means that might be resorted to in obtaining or receiving concessions or rebates from the published tariffs; to suppress unjust discriminations and undue preferences; to make the published rates inflexible while in force, and to cause them to be unalterable except in the method prescribed; and, finally, to secure uniformity and certainty of charges for services of every kind to be rendered by a carrier.

Atchison etc. R. Co. vs. Robinson, 233 U. S. 173;

N. Y. etc. R. Co. vs. U. S., 212 U. S. 500;

Armour Packing Co. vs. U. S., 209 U. S. 56;

N. Y. etc. vs. Interstate Commerce Com., 200 U. S. 361;

L. & N. R. Co. vs. Mottley, 219 U. S. 467;

Schultz-Hanson Co. vs. Southern P. Co., 18 I. C. C. 234;

Kansas City R. Co. vs. Carl, 227 U. S. 639;

Great Northern R. Co. vs. O'Connor, 232 U. S. 508;

Kansas City etc. Co. vs. Albers Com. Co., 223 U. S. 573;

Olson vs. Chicago etc. R. Co., 250 Fed. 372.

"The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service, under the same conditions, should be the one established, published, and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

Armour Packing Co. vs. U. S., 209 U. S. 79.

The purpose of the Congress in prohibiting rebating and unjust preferences, in whatever form attempted, or device resorted to, is based "upon grounds of public policy, and for the protection of third parties."

L. & N. R. Co. vs. Mottley, 219 U. S. 467.

Requirements of the Law.

Every shipper is charged with notice of rates and regulations published and on file with the Interstate Commerce Commission.

Southern R. Co. vs. Prescott, 240 U. S. 632;

L. & N. R. Co. vs. Maxwell, 237 U. S. 94;

Boston & M. R. Co. vs. Hooker, 233 U. S. 97;

Kansas City R. Co. vs. Carl, 227 U. S. 639.

"The tariff, so long as it was in force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike."

Penn. R. Co. vs. Coal Co., 230 U. S. 197;

Poor vs. C. B. & Q. Ry. Co., 12 I. C. C. 422.

It is the duty of a carrier to collect, and of a shipper to pay such rates, and to adhere to such regulations as are prescribed in the published tariffs.

Dayton etc. vs. Cincinnati etc. Co., 239 U. S. 446;

Kansas City etc. Co. vs. Commission Co., 223 U. S. 573;

Macon etc. Co. vs. Atlantic etc. Co., 215 U. S. 501.

Since the Commerce Act forbids carriers remitting, in any manner, or by any device, any portion of the published tariffs, the courts have declared all contracts or special arrangements in conflict with, or in contravention of the published tariffs, rules and regulations, "unlawful" and void.

Southern R. Co. vs. Prescott, 240 U. S. 632;
Atchison etc. R. Co. vs. Moore, 233 U. S. 182;
Atchison etc. R. Co. vs. Robinson, 233 U. S. 173;
Chicago & A. R. Co. vs. Kirby, 225 U. S. 155.

The Commerce Act requires the published tariffs to state the classification of freight, all terminal, storage, icing, and other charges which the commission may require; to include all privileges or facilities granted or allowed; show all rules or regulations which in any wise affect, change or determine any part of, or the aggregate of rates and charges, or the value of the services to be rendered.

Loomis vs. Lehigh Valley R. Co., 240 U. S. 43;
Boston & M. R. Co. vs. Hooker, 233 U. S. 97;
U. S. vs. B. & O. R. Co., 231 U. S. 274;
Adams Express Co. vs. Croninger, 226 U. S. 491.

This rule embodies the policy which has been

adopted by Congress in the regulation of interstate shipments in order to prevent unjust discriminations.

Cincinnati etc. R. Co. vs. Rankin, 241 U. S. 319;

U. S. vs. Union Mfg. Co., 240 U. S. 605;

N. Y. etc. Co. vs. Peninsular Produce etc., 240 U. S. 34.

Value as Affecting Rates and Rebating.

Where the published rates vary with the value of the shipment, actual value determines the lawful rate.

"When the carrier graduates its rates by value, and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate."

Missouri K. & T. Ry. vs. Harriman, 227 U. S. 669.

"The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station.

Texas & P. R. Co. vs. Mugg, 202 U. S. 242;

Chicago & A. R. Co. vs. Kirby, 225 U. S. 155.

Kansas City etc. Ry. vs. Carl, 227 U. S. 652.

See also:

Boston & M. R. Co. vs. Hooker, 233 U. S. 106;

Hart vs. Pennsylvania R. Co., 112 U. S. 337;

Adams Express Co. vs. Croninger, 226 U. S. 508;

Wells F. Co. vs. Neiman-Marcus Co., 227 U. S. 476.

Limited Liability Contracts.

Where it is lawful for a shipper to declare a value different from *actual* value, the carrier may, by contract, limit its liability to the *declared* value.

"But so long as the tariff rate, based on value, remained operative, it was binding upon the shipper and carrier alike, and was to be enforced by the courts in fixing the rights and liabilities of the parties . . . If no value is stated, the tariff rate applicable to such a state of fact applies. If, on the other hand, there are alternative rates based on value, and the shipper names a value to secure the lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that class, and if sued for their loss it is liable only for the loss of what the shipper had declared them to be in class and value."

Great N. R. Co. vs. O'Connor, 232 U. S. 508.

. . . "But in 1906 Congress passed the Hepburn Bill, which established in interstate commerce a uniform rule of liability. That rule of liability is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment, and if a regularly filed tariff offers two rates, based on value, and the goods are forwarded at the low value in order to secure the low rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property."

Chicago R. Co. vs. Cramer, 232 U. S. 493.

See also:

Penn. R. Co. vs. Hughes, 191 U. S. 488;

Adams Express Co. vs. Croninger, 226 U. S. 491;

Wells F. Co. vs. Neiman-Marcus Co., 227 U. S. 469;

Kansas City R. Co. vs. Carl, 227 U. S. 639.

Declaring a Low Value to Secure a Low Rate.

Prior to June, 1915, a shipper could declare any value less than actual value to secure a less rate; and *shipping* value bore no relation to *actual* value.

Adams Express Co. vs. Croninger, 226 U. S. 491;

Pierce etc. vs. Express Co., 236 U. S. 278.

The Carmack Amendment.

The Act of June 29, 1906 (34 Stat. 595—Carmack Amendment), prohibits a carrier *limiting* its liability to any point short of destination.

Atlantic etc. R. Co. vs. Riverside Mills, 219 U. S. 194.

This Amendment withdrew all authority of the States over interstate shipments, vested full authority in the Interstate Commerce Commission, but did not prohibit a carrier *limiting*, by contract, the *amount* of its liability; and contracts limiting the *amount* of the carrier's liability to a declared value, *less* than *actual* value, made to adjust the rate, was legal.

Adams Express Co. vs. Croninger, 226 U. S. 491;

Pierce etc. vs. Express Co., 236 U. S. 239.

In the *Croninger* case it was insisted the "broad language" of the "Carmack Amendment" *created* liability. However, the Court held the amendment did not *create* liability, or *change* common law liability,—

it merely *prohibited* a limitation, by contract, of common law liability to point short of destination.

The First Cummins Amendment.

The Act of March 4, 1915 (38 Stat. 1196,—First Cummins Amendment), amended the Act of June 29, 1906 (34 Stat. 595—Carmack Amendment), by further prohibiting a carrier, as to certain kinds of property, *limiting*, by contract, the *amount* of its liability, in the event of liability.

The Congress, in using the "broad language" the "Carmack Amendment" in the "Cummins Amendment," did not *create* liability, or *change* common law liability; it merely *prohibited* a limitation, by contract, of the *amount* of common law liability, in the event of liability.

Neither the Carmack nor the Cummins Amendment *creates* any thing; both are negative, and merely *prohibit* a contractual change of common law liability—one as to distance, and the other as to amount.

Chicago etc. R. Co. vs. McCaull-D. Co., 252 Fed. 664; 260 Fed. 835; 253 U. S. 97;
U. S. vs. Alaska Steamship Co., 259 Fed. 713;
In re Cummins Amendment, 33 I. C. C. 682;
In re Bills of Lading, 52 I. C. C. 708.

After the passage of this First Cummins Amendment the Interstate Commerce Commission withdrew permission for carriers to measure rates according to a *shipping*, or *declared* value, as to this class of property, and *required* rates to be charged according to *actual* value.

It was while this First Cummins Amendment was in force that the matters in this action arose.

The Second Cummins Amendment.

The Act of August 9, 1916 (39 Stat. 441—Second Cummins Amendment), amended the Act of March 4, 1915 (38 Stat. 1196—First Cummins Amendment), so as to allow rates to be based upon a *shipping* value on all property except ordinary livestock, excluding stock used chiefly for racing, breeding or show purposes; and further provided that as to such ordinary livestock there should be no rates based on "declared" value; and the Commerce Commission classified such property, and applied a flat rate, without reference to the value of the shipment.

Construction of Amendments.

Reports of committees of the House or Senate may be consulted in ascertaining the motive of Congress in adopting a statute.

McLean vs. U. S., 226 U. S. 374;

Lapina vs. Williams, 232 U. S. 78.

Subsequent legislation may be considered as an aid in construing prior legislation upon the same subject.

Tiger vs. Western Invest. Co., 221 U. S. 286.

An amendment to a statute operates precisely as if the subject-matter of the amendment had been incorporated in the amended act at the time of its passage.

Black on Interpretation of Laws, 357.

The construction by officers charged with the enforcement of a statute is entitled to great weight.

Robinson vs. Downing, 127 U. S. 607;

U. S. vs. Healey, 160 U. S. 135;

U. S. vs. Cerecedo, 209 U. S. 339.

An amendment must be construed in harmony with, and as promoting the main purpose of the act it amends.

Texas & P. R. Co. vs. Aberline Co., 204 U. S. 446;

Adams Express Co. vs. Croninger, 226 U. S. 507.

“Being amendments of the Interstate Commerce Act, they are to be read in connection with it and with other amendments of it.”

Texas vs. Eastern Texas R. Co., 258 U. S. 204.

Illegal Contracts.

If the contract of shipment is illegal, no alleged rights connected with it will be enforced by the courts.

Chicago & Alton R. Co. vs. Kirby, 225 U. S. 155;

Illinois Co. vs. Messina, 240 U. S. 394;

Harriman vs. Northern Securities Co., 197 U. S. 244.

“The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.

McMullen vs. Hoffman, 174 U. S. 654.

“There can be no doubt, we think, under the construction given the Interstate Commerce Act (Act Feby. 4, 1887, c. 104, 24 Stat. 379, U. S. Comp. St. 1901, p. 3154) by the Federal Courts,

that every person dealing with an interstate carrier is as effectually bound by the law and the orders of the Commission, as to both freight and passenger tariffs, as is the carrier himself. To hold that either party under any conditions may be estopped from asserting the illegality and invalidity of a contract made in violation of the interstate law and the orders of the Commission, would afford an easy means for its evasion, and and might result in its practical annulment."

Melody vs. Great N. R. Co., 25 So. Dakota, 606, (referred to in *Boston & M. R. Co. vs. Hooker*, 209 Mass. 598, and by the Supreme Court in 233 U. S. 113).

"In Pomeroy on Contracts, Sec. 280 (Specific Performance) after observing that an illegal contract cannot be made the basis of any judicial proceeding, and that no action in law or equity can be maintained upon it, it is said: 'This impossibility of enforcement exists, whether the agreement is illegal in its inception, or whether being valid when made, the illegality has been created by a subsequent statute'."

Louisville & N. R. Co. vs. Mottley, 219 U. S. 484.

No action can be maintained where plaintiff must invoke aid from an illegal contract to make out a case:

Miller vs. Ammon, 145 U. S. 433;

Connolly vs. Union Sewer Pipe Co., 184 U. S. 540;

Chesapeake Co. vs. Maysville Co., 132 Ky. 643;

Gerber vs. Wabash R. Co., 63 Mo. App. 145;

Raleigh & G. R. Co. vs. Swanson, 102 Ga. 754, 39 L. R. A. 275;

Baltimore & O. R. Co. vs. Hamberger, 155 Fed. 849;

Savannah F. & W. R. Co. vs. Bundick, 94 Ga. 775, 5 Inters. Com. Rep. 289;
Chicago etc. R. Co. vs. Kirby, 225 U. S. 155;
Gulf etc. R. Co. vs. Hifley, 158 U. S. 98;
Texas & P. R. Co. vs. Mugg, 202 U. S. 242.

Remedy Afforded Innocent Shippers.

While a shipping contract, which violates the Act of Congress, or the filed and published tariffs, is declared by statute to be "unlawful," and, therefore, unenforcible, yet an *innocent* shipper, who has been imposed upon by a carrier, may not thereby be deprived of his rights, and *may* sue under Sections 8 and 9 of the Act of Feby. 4, 1887 (24 Stat. 382).

Penn. R. Co. vs. Jacoby & Co., 242 U. S. 89;
Penn. R. Co. vs. Sonman Co., 242 U. S. 120;
Morrisdale Co. vs. Penn. R. Co., 230 U. S. 304;
Spiegle vs. Southern Ry., 32 I. C. C. 687;
Schloss-S. Co. vs. Railroad, 40 I. C. C. 743.

The Shipping Contract May Not Be Varied by Parol Evidence.

The Commerce Act requires the shipping contract to be in writing.

Act of June 29, 1906, "Carmack Amendment."
 Act of March 4, 1915, "Cummins Amendment."
Cin. etc. Co. vs. Rankin, 241 U. S. 319;
New York etc. Co. vs. Beaham, 242 U. S. 151.

The filed and published tariff prescribed the form of shipping contract used in this case. (Trans., p.)

That contract, being in writing under the requirement of the statute and the order of the Commerce Commission, may not be varied by parol evidence.

Atchison etc. Co. vs. Robinson, 233 U. S. 180;
Blish Milling Co. vs. Railroad, 241 U. S. 197;
Southern R. Co. vs. Prescott, 240 U. S. 638.

The rights of the parties are such as are shown by the shipping contract; and the shipper will not be allowed to vary the terms of the shipping contract for the purpose of showing a *recovery* value in excess of the *shipping* value, upon which the rate was adjusted.

Even under common law rules a bill of lading, in so far as it is a contract, cannot be varied by parol evidence.

Porter Law of Bills of Lading, Article 14;
Higgins vs. U. S. M. S. Co., 3 Blatchf. (U. S. C. C.) 282;

Grace vs. Insurance Co., 109 U. S. 278;
The Delaware, 14 Wall. 579.

"To permit such a declared valuation to be overthrown by evidence aliunde the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations, and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies."

American Ry. Ex. Co. vs. Lindenburg, decided U. S. Supreme Court, Jan. 8, 1923.

Unless the shipper grounds his right of action on the shipping contract, required by statute and prescribed by the Commission in the tariffs, he states no legal cause of action.

Chicago & A. R. Co. vs. Kirby, 225 U. S. 155;
Blish Milling Co. vs. Railroad, 241 U. S. 197.

APPENDIX

[PUBLIC—No. 325—63D CONGRESS.]

[S. 4522.]

An Act To amend an Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June twenty-ninth, nineteen hundred and six.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of section seven of an Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June twenty-ninth, nineteen hundred and six, as reads as follows, to wit:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he

has under existing law," be, and the same is hereby, amended so as to read as follows, to wit:

"That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, rail-

road, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided, however,* That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained

of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

SEC. 2. That this Act shall take effect and be in force from ninety days after its passage.

Approved, March 4, 1915.

No. 835

Office Supreme Court, U. S.

APR 18 1923

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IN THE
Supreme Court of the United States

October Term, 1922.

ADAMS EXPRESS COMPANY,

Petitioner,

vs.

W. W. DARDEN,

Respondent,

ANSWER AND BRIEF OF RESPONDENT W. W. DARDEN,
IN OPPOSITION TO PETITION FOR CERTIORARI.

J. S. LAURENT,
Louisville, Ky.

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IN THE
Supreme Court of the United States

October Term, 1922.

ADAMS EXPRESS COMPANY,
Petitioner,

vs.

W. W. DARDEN,
Respondent,

**ANSWER AND BRIEF OF RESPONDENT W. W. DARDEN,
IN OPPOSITION TO PETITION FOR CERTIORARI.**

STATEMENT OF THE CASE.

May It Please Your Honors:

The petition for certiorari seeks to have this Court review and reverse the opinion and holding of the United States Circuit Court of Appeals of the Sixth Circuit (Circuit Judges Knappen, Denison and Donahue sitting), affirming the judgment of the Hon. Edward T. Sanford (now Mr. Justice Sanford of this Court) while holding the District Court of the United States for the Middle District of Tennessee, Nashville Division.

To review and reverse the above mentioned opinion and holding of the Court of Appeals of the Sixth Circuit in the instant case, the Adams Express Company, petitioner herein, has heretofore sued out a Writ of Error; and a certified copy of the record and proceedings in the District Court below and in said Circuit Court of Appeals, has been filed with the clerk of this Court, and

is now pending as No. 865 of the October Term, 1922, in this Court.

We will hereinafter, in our Brief supporting this response to the petition for certiorari, present the view that Writ of Error is not the appropriate appellate procedure in this case. (Post, p. 32.)

In said writ of error proceeding pending in this Court we will later present and submit a Motion to Dismiss or Affirm, as soon as we have had the opportunity to prepare a proper brief supporting said motion since the receipt by us of the printed transcript of the record, and as soon as proper notice of the submission of said motion can be given under the Rules of this Court.

Since we insist that this is a case in which the jurisdiction of the District Court below depended entirely upon a diversity of citizenship; that, consequently, the judgment and holding of the Circuit Court of Appeals was final; and that, consequently, a Writ of Error is not appropriate appellate procedure—we will now proceed to show your Honors how frail and substanceless, on its merits, is this application for the Writ of Certiorari.

Outline of Proceedings Below

Respondent, W. W. Darden, who was plaintiff in the District Court below, and is hereinafter referred to by name or as plaintiff, brought this suit in the year 1915, against petitioner, Adams Express Company, hereinafter referred to as the Express Company, or as defendant, to recover \$65,000 damages, representing the value of five thoroughbred race horses belonging to said Darden, which were killed on the night of July 7, 1915, in a railroad wreck occurring about twelve or fourteen miles northeast of Cincinnati, Ohio, while said horses were being transported by said Adams Express Company from Latonia, Kentucky, to Windsor, Ontario, in the Dominion of Canada.

The original declaration of plaintiff Darden was filed against the Express Company and the Pennsylvania Railroad Company (Trans., pp. 1-5); and later, by amendment, the suit was extended so as to include the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company; and an amended declaration in the

District Court below was filed against said Express Company and these two Railroad Companies. (Trans., pp. 6-11.)

Later,—it not being clear that either of said Railroad Companies had any agent residing in the Federal District in which the suit had been brought upon whom process could be served, and because the Express Company, in any event, was responsible for the negligent action of the Railroad Company, which was transporting the horses in question as the agent of said Express Company, at the time and place of the wreck and accident in question—the case in the District Court below was non-suited as to the two defendant Railroad Companies. (Trans., p. 12.)

The case was first tried below in the year 1916, before the Hon. Edward T. Sanford, then District Judge, and a jury, and resulted in a verdict for plaintiff and against the Express Company, which was set aside by the District Judge for reasons stated in a memorandum opinion filed by him. (Trans., pp. 12, 13.)

Thereafter, in November, 1921, another trial occurred before the same District Judge and a jury, and resulted in a verdict in favor of said Darden and against the Express Company for \$32,500. (Trans., p. 14.)

During the progress of this last trial in the District Court below the District Judge had occasion to rule upon certain technical motions made by the Express Company; and the opinions of the District Judge making these rulings are contained in the record. (Trans., pp. 15, 38, 39, 40.)

The Express Company duly made its motion for a new trial in the District Court below, which motion was limited to the alleged errors of the trial judge in overruling the Express Company's motions during the trial, and which motion was overruled (Trans., pp. 15, 40-42); and thereupon the Express Company sued out a Writ of Error removing the case to the United States Circuit Court of Appeals for the Sixth Circuit (Trans., pp. 45, 46); and said Court of Appeals, on January 9, 1923, speaking through Circuit Judge Knappen, handed down its learned opinion, affirming in all respects the holding and judgment of the District Court below. (Trans., pp. 48-53.)

The Nature of the Question Now Presented

The only question now presented by this application for Certiorari relates to the measure of damages.

That the Express Company "received for transportation" the race horses in question to be carried from a point in the United States to a point in the Dominion of Canada, is admitted, and indeed was finally *stipulated* in the District Court below. (Trans., p. 35.)

That these race horses of Mr. Darden were killed as the result of the *negligence* of the Express Company and its Railroad Company agent, is not now denied. (Trans., pp. 16, 35, 40.)

That Mr. Darden, the owner of said race horses so negligently destroyed by the Express Company, never signed any shipping paper or contract reciting that said horses were only worth \$100 each, is admitted and conceded. (Trans., pp. 16, 18-20; 21, 22.)

That the shipping paper or so-called contract reciting that plaintiff Darden's horses were only worth \$100 each was a *fraudulent thing*, and that neither Mr. Darden, nor anyone representing him or purporting to act for him, knew anything about said alleged contract *at all*, is not denied but, on the other hand, is admitted and conceded. (Trans., 16-42.)

That plaintiff below, Mr. Darden, had no knowledge about any statement or representation in any shipping paper or contract that his race horses were worth only \$100 each, is not denied. We quote the following from the transcript of the record in the District Court below:

"Before the Court ruled on the defendant's motion for a directed verdict at the conclusion of all the evidence, the Court stated: 'I understand it is not insisted that there was any actual fraud or misrepresentation.' To which defendant's counsel replied: 'If your Honor please, no, not involving moral turpitude. We don't claim there was any deception'." (Trans., p. 39.)

The statement on page 5 of the petition for Certiorari to the effect that Mr. Darden "knew these horses were not to be valued at their worth" is at absolute variance with the above quoted answer made by defendant's counsel to the question of the Dis-

trict Judge below, and is inaccurate and not true; and there is not a *word* in the record to *warrant* such statement.

That this railroad wreck occurred, and that plaintiff Darden's thoroughbred horses were *negligently killed* while the Cummins Amendment of March 4, 1915, in unmodified form, was in full force and effect, is admitted and conceded. (Trans., pp. 16-22.)

Said Cummins Amendment of March 4, 1915, in so many words, *declares* and *enacts* that plaintiff Darden and all other parties in like condition, shall have the right to recover the "full actual loss, damage or injury" sustained; and further declares that "no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt said common carrier, railroad or transportation company, from the liability *hereby imposed*"; and said Cummins Amendment of March 4, 1915, further declares and enacts, that Mr. Darden and all other parties in like condition, shall have the right to recover such "full actual loss, damage, or injury to such property"—

"notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void:" (Post pp. 50, 51.)

We accordingly submit that the sole and only question presented to your Honors in this application for Certiorari is conclusively answered by the *express terms* and *provisions* of the Cummins Amendment of March 4, 1915. If said Amendment means what it so *plainly says*, then there is *no merit*, we respectfully submit, in this application.

This Court has already had occasion to rule and announce that said Cummins Amendment of March 4, 1915, is plain, unambiguous and unmistakable in its terms, and does not admit of any reasoning or construction in respect of its plain provisions.

Chicago, etc., Ry. Co. v. McCaull-Dinsmore Co., 253 U. S., 97-110.

For the convenience of your Honors we reprint in this same volume, as Appendix "A," the Cummins Amendment of March 4, 1915, in full. (Post, pp. 50-52.)

The Statement of the Controlling Question in the Petition for Certiorari is much too Narrow and is wholly Misconceived.

The plainly revealed purpose of the Cummins Amendment of March 4, 1915, was to give to any shipper a statutory right to recover, from any carrier or transportation company "receiving property for transportation" (within the definition of the Act), "for the full actual loss, damage or injury to such property, *caused by it*" or by any connecting carrier to whom same was delivered for such transportation.

And said Cummins Amendment of March 4, 1915, then expressly declares that such right to recover such full actual loss shall be *beyond the reach* of any "contract, receipt, rule, regulation, or other limitation of any character whatsoever" to exempt from, or relieve against.

And said Cummins Amendment of March 4, 1915, then goes further and expressly declares *such liability* of the transportation company "for the full actual loss, damage or injury to such property, caused by it" or by any connecting carrier to which the shipper's property is delivered for such transportation,—"*notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void.*"

In the face of the above sweeping and exact language contained in the Cummins Amendment of March 4, 1915, we quote the following (whatever it may mean?) from page 3 of the Petition for Certiorari to which we are responding:

"In the absence of oral testimony, the shipper is entitled to recover the value of the horses stated in the shipping contract; however, allowing such oral evidence, and thus contradicting the value stated in the shipping contract, and on which the transportation charge was based, makes the shipper disclose the illegality in the contract. This evidence disclosed giving and receiving a rebate in violation of the Commerce Act and the filed and published tariffs under

which the shipment was made—the ‘device’ resorted to being to undervalue the shipment and apply the rate to this undervaluation, instead of to actual value, as required by the filed tariffs and Act of Congress.”

How could “the full actual loss, damage or injury” (which the Act declares the shipper shall have the right to recover) be made to appear except by oral testimony—if the alleged shipping contract undertook to *limit or understate* it?

When the oral testimony as to the “full actual loss, damage or injury” is introduced our learned adversaries seem to insist, notwithstanding the language of the Act to the contrary, that same can not be recovered, because there is *thereby* disclosed the “illegality of the contract” in that a rebate was received by the shipper in violation of the “filed and published tariffs under which the shipment was made.” How can this be true, in the face of the right of the shipper to recover his “full actual loss” given by the Act, “notwithstanding” any limitation of liability or the amount of recovery, or representation or agreement as to value, in any contract, rule or regulation “or in any tariff filed with the Interstate Commerce Commission”? How can this be true in the face of the language of the Act declaring that “any such limitation, *without respect to the manner or form* in which it is sought to be made is hereby declared to be *unlawful and void*”?

And again, in the face of the express command of said Cummins Amendment of March 4, 1915, we quote the following (whatever it may mean?) from the petition for certiorari filed in this case, as same appears italicized on page 3 of said petition:

“The inquiry, therefore, is whether a shipper may vary by parol evidence the written terms of a shipping contract required by law, and prescribed by the Commerce Commission, ‘for the purpose of enabling the shipper to obtain a recovery in excess of the maximum valuation’ stated in the contract; and, if such evidence, when admitted, shows the shipper received a rebate in clear violation of law, can such ‘illegal’ contract be enforced for his benefit.”

This case presents, logically, no question of the enforcement of any “illegal” contract for the shipper’s benefit. The only question presented is the “other way round”—that is, can an “illegal” contract or limitation upon value (expressly declared

to be "unlawful and void" by the Act of Congress) be invoked by the Express Company to prevent the shipper from recovering his "full actual loss, damage or injury," when said Cummins Amendment of March 4, 1915, expressly gives the shipper this remedy "notwithstanding" any such contract or representation as to value, or attempted limitation of liability "without respect to the *manner or form* in which it is sought to be made."

The quoted language ("for the purpose of enabling the shipper to obtain a recovery in excess of the maximum valuation") contained in the last excerpt above copied from the Petition for Certiorari in this case, seems to have very much *impressed* our learned adversaries. This quoted language not only referred to on page 3 of said Petition, but also on pages 5, 6, 10 and at other places in same, is really a *fragment* of the language used by this Court in *American Railway Express Co. v. Lindenburg*, decided January 8, 1923 (a case involving the construction of the Act of Congress of August 9, 1916, which was an amendment of the Cummins Amendment of March 4, 1915, and not passed until more than a year after the wreck and accident in question: Post, pp. 31) following the language of the Court in *Kansas City So. Ry v. Carl*, 227 U. S., 639, which was a case arising long before the Cummins Amendment of March 4, 1915, and dealing with the state of the law then existing. This language of this Court which seems to have so impressed our adversaries was never used in any decision of this Court arising under, or affected, by the Cummins Amendment of March 4, 1915, and can not be relevant in any way thereto, because of the *very language* of said last mentioned Act.

In the case at bar it should not be lost sight of for a moment that this shipper (Mr. Darden) never knew of the alleged "shipping contract" and no one authorized or purporting to act for him ever saw this alleged "contract" until same was presented by the Express Company at the first trial of this case in the District Court below. (Trans., pp. 19, 22, 33, 34.)

The alleged "contract" was nothing but the *crooked device* and *fraudulent thing* of the Express Company's agent (one Fenrock) who never testified at the last trial below at all. It will be observed that when the plaintiff below (Darden) at the last trial was proceeding to prove the actual value of his horses destroyed, the Express Company objected on the ground that the

"contract of shipment" governed. (Trans., p. 20.) When the witness Louden was testifying, the pretended "shipping contract" (which had been first introduced as defendant's Exhibit No. 2 on a former trial) was merely shown to the witness for the purpose of having him deny that he, as Mr. Darden's agent, ever assented to said "contract" or ever made any representation that the horses of Mr. Darden therein stated to be worth only \$100 each, were worth only that sum. (Trans., pp. 22.)

The witness Seamster (without contradiction) also denied that he ever pretended to act, or was understood as acting, for plaintiff Darden in any way connected with the writing up of said "contract" by the Express Company's agent, or that he was asked to make or made any statement as to the value of Mr. Darden's horses at all. (Trans., pp. 33-35.)

And Mr. Darden (without contradiction by anyone) proved that he made no representation as to the value of his horses; never knew of but the one express rate or charge he was asked to pay; and never assented to said contract or the statements thereof, and never authorized any one else to do so for him. (Trans., p. 19.)

And then, upon inquiry by the District Judge below, the counsel for the Express Company expressly stated: "We don't claim there was any deception." (Trans., p. 39.)

The plaintiff below (Darden) undertook to prove, and did prove (without contradiction), his oral conversation and understanding with the Express Company's agent, one Fenrock (Trans., pp. 16-21) merely for the purpose of showing that the Express Company "received for transportation" his race horses to be carried from a point in the United States to a point in an adjacent foreign country (as contemplated by the Cummins Amendment of March 4, 1915). This fact was afterwards expressly stipulated to be true. (Trans., p. 35.)

So we say that our adversaries wholly misconceive and misstate the questions involved in their instant petition and application for the Writ of Certiorari.

In the face of the showing that the Express Company received the horses in question "for transportation" as contemplated in the Cummins Amendment of March 4, 1915; and that the destruc-

tion of these horses was *negligently* "caused by it" and its Railroad Company agent—all effort to escape liability for "the full actual loss" to the shipper must be a futile and idle effort—we respectfully submit.

We invite a reading by this Court of the ruling of the District Judge below, in which he correctly construed, we submit, the Cummins Amendment of March 4, 1915, and said he could not "avoid the broad language of the statute." (Trans., pp. 38, 39, 40.)

The Court of Appeals of the Sixth Circuit reached the same conclusion, and its learned opinion is in the transcript of the record. (Trans., 48-53.)

And the rulings below are in square accord with the decision of this Court in the *only case* wherein the *broad language* of said Cummins Amendment of March 4, 1915, has come before your Honors for construction and administration.

Chicago, etc. Ry. Co. v. McCaul-Dinsmore Co., 253 U. S., 97-100.

Rates Based on Value

We quote the following from page 9 of the Petition for Certiorari to which we are responding:

"The trial judge believed the 'Cummins Amendment' forbids rates varying with value; that the same rate must be charged by the carrier for transporting and insuring the most valuable and the least valuable race horse; that the owner of a race horse which cannot 'race,' and therefore worth no more than an ordinary horse, must pay the same amount as the owner of 'Man o' War.' The Court of Appeals assumes, for the argument only, this to be an incorrect construction of the 'Cummins Amendment.' Petitioner respectfully insists such a construction of a mere amendment to the Commerce Act should not be sustained, since it brings the statute in conflict with what this Court said in *Express Co. v. Croninger*, 226 U. S., 508, that a carrier has the inherent right to receive a compensation commensurate with the risk; it is clear Congress had no purpose to impose such a hardship on carriers or shippers, and the history and purpose of the amendment forbids such a construction."

We cannot follow the reasoning of our adversaries when they thus insist that the construction placed upon the Cummins Amendment of March 4, 1915, by the District Judge should not be sustained because, as they say, it is a "mere amendment" to the Interstate Commerce Act, and that such a construction would bring said Amendment in conflict with what this Court said in *Express Company v. Croninger*, 226 U. S., 508. We shall later see that, admittedly, this Cummins Amendment of March 4, 1915, was passed for the very purpose of obviating the state of the law resulting from the holding in said *Croninger* case.
(Post, pp. 33-43.)

What the District Judge said in regard to the right of the carrier or transportation company to charge rates based on value, after the passage of the Cummins Amendment of March 4, 1915, was the following:

"I am very much inclined—although it is not necessary for me to determine that—I am very much inclined to think I was in error in the first trial of this case when I expressed the opinion that it was proper, after the passage of the Cummins Amendment, to have different rates based on value, the practice followed by the Interstate Commerce Commission in establishing rates based on graded value. I am very strongly inclined to think that that Cummins Amendment intended to stop that entirely, and intended to make the carrier liable for the full value and that necessarily would take away rates based on values, where the whole consideration for the lower rate was that there was to be a reduced liability. If the liability was to remain the full value, I don't think there would be a different rate for that special classification.

"Articles might be classed under different tariffs; and I take it different kinds of animals could be classified, draft horses, race horses, brood mares, stallions, etc.—I don't know what the reasonable classification would be—passed on by the Interstate Commerce Commission. I do not think the Amendment intended to deprive the carrier of the right to fix proper rates, based on classification, etc., except in so far as that classification was based upon the actual value of specific, individual things shipped, which was no longer to be permitted in my judgment.

"That conclusion is in accordance with the various decisions.

(Citing same.)"

(Trans., pp. 38, 39.)

And the District Judge upon the same subject, when he later ruled on the Express Company's motion for a directed verdict, said:

"The motion last made by the defendant for a directed verdict must be overruled. I see no reason to change my conclusion as to the effect of the Cummins Amendment. And in addition to what I have heretofore said on that point, I overlooked saying that in support of the view that after the adoption of the Cummins Amendment and before the amendment of 1916, there could not be rates based merely upon values, it appears that such an amendment to the Cummins Amendment was actually suggested, and was recommended by the Senate Committee on Interstate Commerce; which recommended an amendment, before the Cummins amendment was finally passed, which incorporated words giving the Interstate Commerce Commission power to establish rates varying with the value agreed upon, which amendment was not adopted; thus indicating positively, it seems to me, the intention of Congress that such rates should not be permitted under the Cummins Amendment as it was adopted—almost an irresistible inference to that effect from the action of Congress itself." (Trans., p. 39.)

We respectfully submit that the above-quoted views of the District Judge in regard to the right of the carrier to establish rates based upon value as declared by the shipper, while the Cummins Amendment of March 4, 1915, was in effect in unmodified form, are manifestly correct in view of the plain language of said Amendment, and particularly of the language of the *proviso* thereto declaring (as the only case in which such practice would be permissible) that if the goods were hidden from view by wrapping, boxing or other means, and the carrier is not notified as to the character of the goods,

"the carrier may require the shipper to specifically state in writing the value of the goods . . . *in which case* the Interstate Commerce Commission may establish and maintain rates for transportation dependent upon the value of the property shipped, as *specifically stated in writing by the shipper.*" (Italics ours.)

Post, p. 51.

The District Judge was also correct in stating that the Senate Committee on Interstate Commerce recommended an amendment before the Cummins Amendment was finally passed, which amendment would have incorporated words giving the Interstate Commerce Commission power to establish rates varying with the

value agreed upon, which recommendation was not adopted—thus indicating positively, as the District Judge thought, the intention of Congress that such rates should not be permitted under the Cummins Amendment as it was adopted. For convenience of the Court we quote the following from the report of the Senate Committee on Interstate Commerce referred to:

"There are some commodities which from their very nature the value of them can not be known to the carrier, and is peculiarly within the knowledge of the shipper. The carrier is compelled to rely upon the representations as to value made by the shipper. We have, therefore, recommended the adoption of an amendment providing that where the Interstate Commerce Commission has already authorized rates based upon value as represented by the shipper, or where the commission shall hereafter do so, the liability for loss or damage caused by the carrier shall be limited to the value as thus represented."

Report No. 407 in respect of Senate Bill No. 4522; 63d Cong., 2d Session.

Said proposed amendment was voted down and the *proviso* in question was adopted instead, in the language in which said proviso was finally incorporated in the Act, upon motion of Senator Reed of Missouri.

Cong. Record; Senate, 63d Cong., 2d Session., Vol. LI, June 4, 1914, p. 9783.

As showing that the District Judge was correct in his view that the rejection by the Senate of the proposed amendment to the Cummins Amendment (as introduced) allowing rates to be based on value in respect of certain commodities "which from their nature the value of them cannot be known to the carrier and is peculiarly within the knowledge of the shipper." was deliberately intended to prevent the making of rates based on value as declared by the shipper (when the goods were not concealed from view), and that this was intended to be accomplished as to all commodities not concealed, including race horses—we quote the following from the debate in the Senate preceding the action of the Senate in striking out the proposed Committee amendment and adopting in lieu thereof the language of the proviso as proposed by Senator Reed, as same became finally incorporated in the Act:

"MR. CUMMINS: I want to reply, however, to the Senator from Missouri. The subcommittee has given this matter a great deal of thought; we had long hearings upon the

subject. The very thing that the Senator from Missouri thinks might be done, or ought to be done, I think is provided for here. The Interstate Commerce Commission is given authority to take *certain things* out of the prohibition of the statute if it grants express authority to make a rate based on value declared in writing. That is just what is done.

Let me suggest why that is necessary. Take a Kentucky race horse worth \$25,000 which is delivered to the railroad company for shipment. The railroad company will not take the horse for anything like a reasonable or payable rate unless there is an agreement with regard to the amount of recovery. If the railroad company is held to be the insurer of that animal to the extent of \$25,000, the rate becomes so high that shipment becomes impossible, and we must allow in such cases, if the Interstate Commerce Commission authorizes it, a recovery based upon declared value in order to secure a transportation rate that the shipper can pay and still accomplish his purpose.

I think if the Senator from Missouri will look further into the particular part of the amendment he is considering he will find that the very thing that he wants to accomplish is accomplished by the amendment."

Cong. Record, Senate, 63d Cong., 2d Session. June 2, 1914, p. 9624.

It was after the above that the Senate took its action rejecting the proposed Committee amendment and adopting the language of the *proviso* in question as it finally became incorporated in the Act.

We will later herein further refer to the proceedings in the Senate, demonstrating that the Cummins Amendment of March 4, 1915, was intended to prevent the carrier from doing the very thing sought to be accomplished by the Express Company in the instant case.

Post, pp. 36-38.

What the Court of Appeals of the Sixth Circuit in the instant case said upon the subject under discussion is contained in the third foot-note to its opinion, as follows:

"We have assumed, for the purposes only of this opinion, but without so deciding, that it was competent for defendant to make varying rates for carriage, dependent upon the value of the shipment so long as no attempt was made to

limit liability below the actual loss, damage or injury suffered." (Trans., p. 50.)

But, of course, there is no rate question involved in the instant controversy; and the effect of the language of the *proviso* in question as contained in the Cummins Amendment of March 4, 1915, in allowing rates based upon value in cases where the goods are hidden from view by wrapping, boxing or other means, is immaterial in the instant case. What the Court of Appeals said on this subject, as contained in the second foot-note to its opinion, is manifestly correct:

"The amendment contained a proviso permitting the carrier to require the shipper specifically to state the value of the goods when hidden from view by wrapping, boxing or other means, and relieving the carrier from liability beyond the amount so stated. But this proviso has, of course, no relation to the case under consideration." (Trans., p. 50.)

And the fact that the later Act of Congress, of August 9, 1916, C. 301, 39 Stat., 441 (hereinafter quoted—Post, p. 31), was passed, giving to the Interstate Commerce Commission power to allow rates to be based on value in cases where the goods were not hidden from view—emphasizes, we submit, the correctness of the view of the District Judge below. This Act of August 9, 1916, was the Act before this Court for construction in the recent case of *American Railway Express Co. v. Lindenburg*, decided January 8, 1923, Adv. Opinions No. 7, 67 L. Ed., 227.

This Act of August 9, 1916, amending the Cummins Amendment of March 4, 1915, can, of course, have no bearing on the instant controversy. As to this the Court of Appeals in its opinion in the instant case, said:

"The situation as respects the contract in this case is not changed or affected by the second Cummins Amendment (Act Aug. 9, 1916, C. 301, 39 Stat. 441—passed more than a year after the making of the contract and shipment here in question) which second amendment excepts from the prohibition against limitation of liability 'property, *except ordinary livestock*, received for transportation, concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper

*Italics throughout this Brief are ours.

or agreed upon in writing, as the released value of the property,' etc." (Trans., p. 50.)

The only question presented by the instant petition for Certiorari arises from the effort of the Express Company, by some process of reasoning (which we admit we do not understand) to take this case out of the plain and unmodified language of the Cummins Amendment of March 4, 1915; and as stated, no rate question is relevant at all to any phase of the instant controversy; and that is why neither the District Judge nor the Court of Appeals found it necessary to decide in just what cases, if any, rates could be based on value as declared by the shipper, where the goods were not hidden from view, under the language of the Cummins Amendment of March 4, 1915.

The Case with More Detail

The *gravamen* of plaintiff's suit is that defendant Express Company "received for transportation" plaintiff's valuable thoroughbred horses, and then *negligently* destroyed said horses; and that consequently, under the Cummins Amendment of March 4, 1915, said Darden, as the owner of said horses, is entitled to recover the "*full actual loss, damage or injury to such property.*"

The case of plaintiff below, by the allegations in both the original and amended declarations, is based on the underlying charge that the Adams Express Company, after contracting and agreeing to ship and transport plaintiff's five valuable thoroughbred race horses from Latonia, Kentucky, to Windsor, Canada, in a first-class steel express or palace horse car, *actually received* said horses for *such transportation*, and then "unlawfully, wrongfully and *negligently*" loaded them into an old, worn, rotten and defective wooden car which, by reason of its defective, rotten and unsafe condition, broke and pulled in two and apart, and became derailed and wrecked; and that after *receiving* said horses and loading them in this defective wooden car, the Railroad Company, acting as agent for and under the instructions of the Express Company, "unlawfully, wrongfully and *negligently*," and contrary to the usages and practices of good and safe railroading, placed said defective car at the front or head end of a train, with a long and heavy train con-

sisting almost entirely of steel cars coupled behind the defective car, and with a large and heavy locomotive coupled to the front of same, for the purpose of drawing said heavy train—thus and thereby unlawfully, wrongfully and negligently and unnecessarily putting and placing an undue strain upon said defective car; and thus it was alleged and insisted by the plaintiff below, the old, rotten and defective car in which said horses were being shipped, on account of its inherent weakness and the undue and excessive strain negligently placed upon it by defendant Express Company and its agent the Railroad Company, was caused to wreck, and the five valuable race horses belonging to said Darden were consequently killed. (Trans., pp. 1-5; 6-11.)

It will be noted that in both the original and amended declarations it was alleged that the defendant below, Adams Express Company, and its agents the Railroad Companies originally made defendants to the suit—

“were common carriers, railroads or transportation companies, subject to the provisions of an Act of the Congress of the United States of America, entitled ‘An Act to regulate commerce,’ passed February 4, 1887, and other acts of said Congress amendatory thereof, and particularly an act passed March 4, 1915.” (Trans., pp. 1, 7.)

The aforesaid amendatory Act of Congress known as the Cummins Amendment, was passed as above stated on March 4, 1915, and by its terms and provisions became operative ninety days after its passage. Said Cummins Amendment therefore was, and had been, in force for more than thirty days at the time of the shipment and railroad wreck in question, on July 7, 1915. Plaintiff’s suit is therefore, *admittedly*, a suit to recover damages for the unlawful, wrongful and negligent killing of his five valuable race horses by said Express Company, and *admittedly* comes within the provisions of the Cummins Amendment of March 4, 1915.

We will hereinafter show your Honors that the Cummins Amendment was passed for the *very purpose* of preventing a carrier or transportation company like the Adams Express Company, from being able to take advantage of the very questions which are the *only questions* now sought to be made and presented by said Express Company in this Court; and we will later show your Honors that the *express* and *explicit* terms and

provisions of said Cummins Amendment necessarily have the effect of destroying all the *substance* and *merit* in any and all of the questions now sought to be presented in this Court as reasons for asking a reversal of the judgment of the Court below.

All the authorities cited by our adversaries,—with a few exceptions,—and all the reasoning contained in their learned brief, are *obsolete* so far as this case is concerned, by reason of the *very terms* and *provisions* of said Cummins Amendment of March 4, 1915, which was in full force and unmodified at the time of the shipment and wreck in question, and which had been passed for the very purpose of *cutting in behind* and rendering *nugatory* every question now presented by the Express Company in this Court.

The Limited and Restricted Bill of Exceptions.

The bill of exceptions reserved by the Express Company in the District Court below is a very limited and restricted one. In addition to incorporating and presenting certain certified copies of tariffs and express classifications on file with the Interstate Commerce Commission at the time of the receipt of this shipment of horses, the bill of exceptions only undertakes to present the evidence given by the plaintiff Darden and his witnesses in the Court below, with respect to certain conversations which occurred between said Darden and one Fenrock, the agent of the Express Company in regard to the *reception* by the Express Company of the horses for *transportation* from Latonia, Kentucky, to Windsor, Canada; to the payment of the transportation charge by said Darden to said agent of the Express Company; and in regard to the *false and fraudulent filling out*, by the Express Company's agent, of a paper referred to in the record as the "Contract of Shipment" or the "Adams Express Company Non-negotiable Live Stock Contract" purporting to have been signed by the said Darden or his duly authorized agent, but not actually so signed.

The original of this alleged "Contract of Shipment," by the special order of the District Judge, accompanies the transcript of the record in this case. This alleged contract had been marked "Defendant's Exhibit No. 2" on a former trial, and was

marked "Plaintiff's Exhibit No. 2" on the last trial below, and said alleged "Contract of Shipment" appears copied in the printed record. (Trans., pp. 22-28.)

It is proper to state that Mr. Fenrock, the agent of the Express Company, did not testify at the last trial of this case in the District Court below, nor is his failure to testify explained at all; and the testimony of the plaintiff below, Mr. Darden, and his witnesses, in regard to his conversations with this agent of the Express Company, Mr. Fenrock, the receipt by the latter of the Express Company's charge for the transportation of the shipment, and the false and fraudulent filling out of this so-called "Contract of Shipment" by said agent of the Express Company without the knowledge or consent of said Darden or any one authorized to represent him, or purporting to act for him,—is all uncontradicted and constitutes all of the evidence on these subjects.

Darden, Trans., pp. 16-21.

Louden, Trans., pp. 21-33.

Seamster, Trans., pp. 31-44.

From the above cited testimony of the plaintiff below and his witnesses it was made to appear, without contradiction or dispute, as follows:

(1) About ten days before July 7, 1915, plaintiff Darden spoke to Fenrock, the agent of the Express Company, about wanting a two-door steel car in which to ship his horses from Latonia, Kentucky, to Windsor, Canada, and at this time said agent agreed to furnish such a car on July 6th; and at that time told Darden that the rate was \$165.00 for such car. (Trans., p. 17.) Darden knew this agent of the Express Company, who came out to the race track at Latonia and around the stables, and there solicited express business for his company. (Trans., p. 17.)

(2) Said agent of the Express Company (Fenrock) *knew* the horses which Darden desired to express and *knew* they were very *high-class* race horses and had won a lot of money and attracted the attention of the people at the race track at Latonia; and Darden told this agent of the Express Company that his horses were entered in several stake races in Canada, and he wanted to get them there in time to have them "freshened up" for these races; and then told said agent that these

horses were *very valuable race horses* and that he wanted the car thoroughly cleaned and fumigated, so as to take no chances of his horses being given any disease. (Trans., pp., 16-21.)

(3) On the morning of July 6, 1915, Darden saw said agent of the Express Company (Fenfrock), who then explained that he had no car that he could furnish that day, but said he would have a car on the next day, July 7. Thereupon Darden arranged with this agent that he (Darden) would have one-half of said car and "Seamster and others" the other half of the car, and that Darden would leave a check for \$82.50 for his half of the car with his trainer, Henry Loudon, a colored man; and Darden then told said Fenfrock that he was going back to Nashville that night and said agent agreed that he would have the car available the next day, and Darden gave him, and he took down, the names of the three attendants who were to accompany the horses in Darden's half of the car, which included Henry Loudon. (Trans., pp. 17, 18.)

(4) The Express Company's agent (Fenfrock) understood that Darden was only to get half the car and was only *contracting* with reference to *that half* in which his six horses were to be expressed; and said agent agreed to have Darden's half of the car stalled off for his six horses; and Darden explained to the agent on this morning of July 6, 1915, that Seamster and others would take and pay for the other half of the car, and that said agent was to *collect* for this half from these other men; and an understanding was had between Darden and said agent whereby the former was to get the check of the Latonia Race Track Association for \$82.50, and leave this check with his trainer Loudon, who would go in the car in charge of Darden's six horses. After this understanding Darden left Latonia on July 6th, and did not know anything about what happened thereafter until five of his six horses which were shipped on the following day (July 7, 1915) had been killed in the wreck which occurred on the night of that day. (Trans., p. 18.)

(5) Darden never saw any paper or shipping contract; no such contract was proferred to him to sign, and he never authorized any one to sign any contract for him; and the signing of any such contract was never discussed between him and the agent of the Express Company. The only rate quoted Darden by the Express Company's agent was \$165.00 for the entire car,

and \$82.50 for half of the car; and no valuation was placed by Darden on his horses, nor was he asked to fix any valuation thereon; and Darden did not know there was any other express rate by which he could ship his horses from Cincinnati, Ohio, to Windsor, Canada, except the rate the agent quoted him. Darden never heard of two express rates; the agent did not say anything to him about any valuation on his horses, nor did he name or fix any values thereon, nor did he ever authorize any one to place any values on his horses, and his trainer, Henry Loudon, a colored man, did not and would not know the value of these horses. (Trans., p. 19.)

(6) Mr. Darden's trainer, Henry Loudon, was present when the Express Company received Mr. Darden's horses on July 7, 1915, and had them loaded into the car in question. He saw Seamster, who was looking after some race horses shipped in the other half of the same car, talking with the Express Company's agent (Fenrock); and saw this agent and Seamster fixing up a contract. Loudon gave the Express Company's agent the check which Mr. Darden had left with him for his half of the car. Loudon did not sign any shipping contract, and he never saw the alleged shipping contract in question, though he had seen similar contracts before. When the horses were loaded in the car the agent of the Express Company filled in the contract right there at the car, using a book to write on, and this contract was not presented to Loudon for signature at all. The name of this witness (Loudon) appearing signed to the "Attendant's Contract" which is part of the alleged contract of shipment, was not signed thereon by said Loudon. The Express Company's agent (Fenrock) was doing the writing when Loudon saw him and Seamster fixing up the contract. No copy of this contract was given to Loudon. (Trans., pp. 21, 22.)

(7) The alleged "Contract of Shipment" had been introduced at a former trial and marked Defendant's Exhibit No. 2 (Trans., p. 22); and this paper the contents of which thus came to the knowledge of plaintiff after the wreck, was shown to the witness Loudon at the last trial below, and was then marked "Plaintiff's Exhibit No. 2" (Trans., p. 22) and as stated above Mr. Darden had never seen the paper before his horses were killed, and his trainer Loudon proved, as above stated, that he had not seen this paper at all, did not sign it, and that no copy of it was given to him.

(8) Seamster testified for Plaintiff below, and proved that he was interested in one horse which was among the seven shipped in the other half of the car from the half occupied by Darden's six horses,—there being thirteen horses in the car at the time of the wreck. Seamster testified that it was his signature which appeared as the bottom signature "W. Seamster" at the top of page 3 of said printed contract (Original of Plaintiff's Ex. No. 2); and that his name appearing as the top signature to the "Attendant's Contract" on page 3 of said original Exhibit, was not signed by him. Seamster did *not* give *any information* to the Express Company's agent in regard to the value of any horses in the car. He merely signed the contract at the top of page 3 thereof, because he was asked to do so by the agent, and he owned one horse in the car. Seamster did not read the contract and he was not authorized by Mr. Darden to sign it for him or as his agent; and the Express Company's agent (Fenrock) knew that he (Seamster) had charge of one-half of the car and that Darden had the other half, and knew that Seamster paid \$82.00 and something for his end of it, in which there were seven horses. There were four different persons owning the seven horses in the half of the car that Seamster settled for with the Express Company's agent; and all Seamster undertook to do was to collect the money from the others in this half of the car and pay the agent of the Express Company for that half. Seamster *did not* "undertake to exercise *any right* or make *any representations* or do *anything* with reference to the end of the car that Mr. Darden's horses occupied"; nor did he undertake to make any payment thereof; and he told the Express Company's agent that he was merely paying for one half of the car, and to get the other half from Mr. Darden's man, Loudon. (Trans., pp. 33, 34.)

(9) In regard to the statement, "13 running horses, value \$100.00" appearing written in on page 2 of the alleged contract of shipment (original of Plaintiff's Exhibit No. 2 accompanying the record; Trans., p. 24) Seamster did not write this into this contract; and while there were thirteen horses in the car Seamster was only interested in one, and had charge of two others, while three other men owned the other four, thus making up the seven horses in one-half of the car; and the plaintiff Darden owned the six horses in the half of the car which Darden settled for; and Darden never authorized Seamster to sign any contract for him; and the Express Company's agent (Fenrock) knew

that Seamster was not the "agent of the the owner" of said Darden's horses, and Seamster told this agent that he would have to collect for the horses in Darden's half of the car from Darden's man, Louden. (Trans., p. 34.)

(10) It was *expressly admitted* by the Express Company in the Court below, in response to a direct question from the trial judge, that there was "*no deception*" practiced by Mr. Darden *at all*. (Trans., p. 39.)

The above is the substance of the uncontradicted testimony contained in the bill of exceptions, which was introduced in the District Court below by the plaintiff Darden and his witnesses in regard to the way and manner in which the shipment of the horses in question was *received* by the Express Company and the transportation charge paid by the plaintiff Darden as to his horses. As stated above, the Express Company's agent (Fenfrock) did not testify at all, and no one testified for the Express Company in regard to any of these matters; and thus the so-called "Contract of Shipment" (original Plaintiff's Exhibit No.2 accompanying the record; Trans., pp. 22-28) appears *admittedly* to be a paper which was never signed by Mr. Darden nor any one authorized to act for him, and never seen by Mr. Darden *nor* any one authorized to act for him prior to the first trial of this case in the District Court below, and the valuation of the horses at \$100.00 each stated therein was a thing that neither Mr. Darden nor any one authorized to act for him ever knew anything about at all until after the horses in question were killed; and no such valuation was placed upon these horses by Mr. Darden or by any one authorized to act for him; and the Express Company's agent (Fenfrock) *knew this*, and *knew* they were "very valuable race horses," and himself *falsely* and *fraudulently* "filled in" this contract, and never gave any copy thereof to Mr. Darden nor to any one authorized to act for him; and all the above is *not denied at all* by any one for the Express Company.

In addition to the above undisputed evidence contained in the bill of exceptions, there is also contained therein a copy of the alleged "Contract of Shipment" (Trans. pp. 22-28); copies of certain published tariffs and express classifications certified by the Secretary of the Interstate Commerce Commission, filed as defendant's Exhibits No. 4 and No. 5 (Trans., pp. 27, 28),—the originals of these tariffs and classifications accompanying

the record by order of the District Judge (Trans., pp. 27, 28) ; and a copy of the order of the Interstate Commerce Commission made on May 25, 1915, known as "Supplemental Order No. 13," which incorporates the terms and provisions of the "Uniform Express Receipt" as this was attempted to be formulated by the Interstate Commerce Commission after the passage and "in the light of the Cummins Amendment to the Act to Regulate Commerce" (Trans., p. 29) ; and a comparison of the so-called "Contract of Shipment" with this order of the Interstate Commerce Commission will show that same was not made out by the Express Company's agent in conformity with the said "Supplemental Order No., 13" of the Commission, which provided that the *shipper* must declare the "actual value" of each animal shipped or the "shipment must be declined." (Trans., p. 32.)

In addition to the above the bill of exceptions contains the testimony of the plaintiff below, Mr. Darden, and his witnesses showing the value of the five race horses in question which were killed by the negligence of the Express Company and its agent, the Railroad Company, and this uncontradicted testimony shows that the horses were reasonably worth *almost double* the amount of damages which the verdict of the jury and the judgment below awarded to the plaintiff Darden. (Trans., pp. 20, 33, 34.)

The bill of exceptions also shows that plaintiff below established, and that indeed it was finally *stipulated*, that the Express Company "received" the horses in question from the plaintiff for transportation and had them loaded into the car, and routed same over the railroad upon which the wreck occurred on the through journey from Cincinnati, Ohio, to Windsor, Canada,—thus bringing the claim and suit of the plaintiff squarely and admittedly under the protection of the Cummins Amendment of March 4, 1915 (Trans., p. 35) ; and the bill of exceptions also shows that the jurisdiction of the Court below, upon the ground of diverse citizenship, was also made to appear, and was indeed stipulated to exist. (Trans., p. 35.)

The bill of exceptions, after setting out how the plaintiff called evidence showing the undisputed facts in regard to the circumstances under which the Express Company *received* these horses for shipment, and tending to show the negligence of the Express Company and its agents, and establishing the value of the five horses killed (Trans., pp. 17-37), and then setting out

the stipulation as to the jurisdiction of the Court and the nature of the through shipment of the horses from a point in Ohio to a point in a foreign country adjoining the United States (Trans., p. 35),—then recites that the foregoing was all the evidence introduced by the plaintiff in chief on the trial in the Court below—

—“except the evidence of *numerous witnesses not included herein* who testified to facts tending to prove and establish that the wreck in question and the consequent killing of plaintiff's horses, was proximately caused by the *negligence* of defendant Adams Express Company and its agent the Railway Company, which owned the car in question and was transporting the same for the Adams Express Company at the time and place of the accident and wreck; and tending to show that said wreck *was not* caused by any act of God—i. e., the storm prevailing at the time and place of the wreck in question.” (Trans., p. 35.)

The bill of exceptions next shows that at the conclusion of the evidence introduced by the plaintiff below in chief, the Express Company made certain technical motions, which were in the very *face* and *teeth* of the express provisions of the Cummins Amendment of March 4, 1915, as follows: (1) to have the Court withdraw from the jury all the evidence offered by plaintiff below in regard to the value of his horses which had been negligently killed; (2) to have the Court withdraw and exclude from the jury all the evidence tending to show the circumstances under which the Express Company received for transportation and undertook to ship the horses in question, on the ground that such evidence “tends to vary the terms and provisions of the published tariffs filed with the Interstate Commerce Commission,” and which governed the shipment in question; and (3) to dismiss the plaintiff's suit because it appeared that the plaintiff shipped his horses on a valuation which was less than actual value, contrary to the filed and published tariffs governing the shipment; and these motions, of course, were overruled by the learned trial judge, who naturally felt constrained to follow the plain language of the Cummins Amendment of March 4, 1915. (Trans., pp. 36-40.)

After the above mentioned motions of the Express Company had been overruled by the trial judge at the close of the testimony offered in chief by the plaintiff below, all that the bill of exceptions shows in regard to any proof introduced by the Ex-

press Company, as defendant in the Court below, in an effort to make out its defence, and by the plaintiff Darden in the Court below, in rebuttal thereof, is the following:

"Thereupon the defendant introduced proof tending to show that the wreck (which occurred about 12 miles above Cincinnati, Ohio, on the lines of the P., C., C. & St. L. Railway and *while the shipment was en route from Latonia, Kentucky, to Windsor, Canada*) and the consequent destruction of five of the six horses shipped by the plaintiff resulted from an act of God, viz.: a violent windstorm, and that no negligence of the Railway proximately contributed to the accident to, and death of plaintiff's property; and the defendant did not offer evidence upon any other question or subject; and thereupon the defendant rested its case.

"The plaintiff then introduced testimony of *experts* in rebuttal, tending to show that the wreck as a result of which the plaintiff's horses were killed *was not proximately caused or contributed to by the windstorm prevailing at the time and place thereof.*" (Trans., pp. 36, 37.)

All the above, which is the *entire showing* made by the bill of exceptions,—demonstrates, we respectfully submit, an utter lack of any *substance* or *merit* in any question now sought to be made in this Court by the Express Company, which is here in the attitude of admitting its *negligence*, admitting the justice of the *quantum* of the recovery, and admitting the *application* of the Cummins Amendment of March 4, 1915, to the claim and suit of this shipper, Mr. Darden,—while said Express Company is merely endeavoring to make certain technical questions which we confess we do not understand, because they are in direct *opposition* to and in direct *contradiction* of the *very terms* and *provisions* of said Cummins Amendment, the constitutionality of which our learned adversaries are not attacking at all and, of course, cannot successfully attack.

No question was ever made upon the correctness of the charge delivered to the jury by the learned District Judge; and therefore said charge does not appear in the bill of exceptions. (Trans., p. 40.)

BRIEF

Propositions of Law:

We present below certain legal propositions which we submit are not open to controversy, and are controlling of all the questions presented by the Express Company in the instant application for Certiorari.

(1) It was long ago well settled as a general proposition that a common carrier cannot by contract *exempt* itself from liability for loss by negligence.

York Mfg. Co. v. Illinois Central Railroad, 3 Wall., 107;
Railroad Co. v. Lockwood, 17 Wall., 357-375;

Bank of Kentucky v. Adams Express Company, 93 U. S., 174.

(2) It was later held and settled that a contract for "limited liability," when fairly made, did not contravene the settled principle of the common law preventing the carrier from contracting against liability for negligence; and the distinct ground of this holding was that where such contract for limited liability was signed by the shipper and fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, such contract would be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight received, and of protecting the carrier against extravagant and fanciful valuations.

Hart v. Pennsylvania Railroad, 112 U. S., 331, 343.

(3) The *Hart* case last above cited was followed by a long line of harmonious decisions construing limited liability contracts, both before and after the Carmack Amendment. Although the language of said Carmack Amendment to the Hepburn law, as amending Section 20 of the Act to Regulate Commerce of February 4, 1887, declared that the carrier should be liable "for any loss, damage or injury" to property received for transportation which was "caused by it" or any connecting carrier—this Court held that said Carmack Amendment, making the initial carrier liable not only for its own negligence, but the

negligence of connecting carriers, did not operate to prevent the carrier from making a contract for *limited* liability where the contract was fair and the lower rate secured by the shipper was obtained upon the faith of an agreed valuation of the property shipped. This construction of the Carmack Amendment was announced by this Court, speaking through Mr. Justice Lurton, in the case of *Adams Express Company v. Croninger*, 226 U. S., 491-503; and following this decision there was a line of cases decided in which this Court continued to administer this same rule in construing and applying the Carmack Amendment.

Adams Express Co. v. Croninger, 226 U. S., 491;
Wells Fargo Co. v. Nieman-Marcus Co., 227 U. S., 469;
Kansas So. Ry. v. Carl, 227 U. S., 639;
M. K. & T. Ry. v. Harriman, 227 U. S., 657;
Chicago, R. I. & P. Ry. v. Cramer, 232 U. S., 490;
Boston & Maine R. R. v. Hooker, 233 U. S., 97;
A. T. & S. F. Ry. v. Robinson, 233 U. S., 173;
Pierce Co. v. Wells Fargo & Co., 236 U. S., 278.

(4) Before the passage of the Carmack Amendment, many of the States had common law rules or had enacted statutes declaring the carrier liable for the *full actual value* of or *damages* to property destroyed or injured in transit, notwithstanding agreed valuations or attempted stipulations to the contrary in the bill of lading; and these State statutes were uniformly sustained and upheld by this Court.

In the *Solan* case, such an Iowa statute, and in the *Hughes* case, such a Pennsylvania rule, were so upheld; and in the *Croninger* case, which was decided after the passage of the Carmack Amendment, the Court, speaking through Mr. Justice Lurton, declared that if the Kentucky statute involved in that case could still be regarded as controlling, it would result that the carrier was liable for the *full valuation* of the property, notwithstanding its agreed or declared value in the bill of lading.

Chicago, Milwaukee, etc. Railway. v. Solan, 169 U. S., 133;

Pennsylvania R. R. Co. v. Hughes, 191 U. S., 477;

Adams Express Co. v. Croninger, 226 U. S., 491, 501-13.

(5) In the *Croninger* case, *supra*, it was held that with the passage of the Carmack Amendment the field of permissible Federal legislation was thereby occupied by this Act of Congress, and that all State statutes and rulings undertaking to declare the carrier liable for full value and damages notwith-

standing attempted limited liability contracts with the shipper, were superseded and became inoperative and passed out of existence, so far as interstate commerce or shipments were concerned; and this ruling was continuously and consistently followed until the passage of the Cummins Amendment of March 4, 1915.

Adams Express Co. v. Croninger, 226 U. S., 491, and other cases cited under proposition 3 *supra*.

(6) It was to *meet the above situation*, in which it was held that the Carmack Amendment had superseded these State statutes and rulings exacting full liability, and to *obviate the construction* placed upon the Carmack Amendment in the *Croninger* case, by which it was held that notwithstanding the language of said Act of Congress carriers could still make such limited liability contracts, when same were fairly made and the reduced rate obtained was based upon the declared value of the shipment—that the Cummins Amendment of March 4, 1915, was passed.

The reports of the Senate and House committees, and the debates in Congress, demonstrate that this is so, and the Courts have consistently recognized this and ruled accordingly.

Chicago etc. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S., 97-100;

McCaull-Dinsmore Co. v. Chicago etc. Ry. Co. (D. C., Minnesota, 4 Div.), 252 Fed., 664;

Chicago, M. & St. P. Ry. v. McCaull-Dinsmore Co. (C. C. A., 8th Circuit), 260 Fed., 835;

Alaska S. S. Co. v. U. S. (D. C., Sou. Dist., New York), 259 Fed., 713, 718-722;

Congressional Record, 63rd Congress, 2nd Session, Vol. 51, pp. 9619-9626, 9777-9783;

Congressional Record, 63rd Congress, 3rd Session, Vol. 52, pp. 5446-5451;

(7) The Cummins Amendment of March 4, 1915, expressly declares *liability for full value and damages* in a case like the one at bar; and its language is so explicit, unambiguous and sweeping, and the purpose of its passage and enactment are so manifest and well recognized, that the very language of this amendment meets and overturns all the contentions of petitioner in the instant application.

38 Stat. L., 1196, 1197;

Quoted at length Post, pp. 50-52.

No argument grounded on "convenience," and no argument based upon the "history" of the statute, or upon the "policy" of the later act of August 9, 1916, c. 301, 39 Stat., 441 (known as the "Second Cummins Amendment"), can prevail against the plain meaning of the words of the Cummins Amendment of March 4, 1915, and the Courts, including this Court, have expressly so ruled and declared.

Chicago etc. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S., 97, 99-101;

Chicago, M. & St. P. Ry. v. McCaull-Dinsmore Co. (C. C. A., 8th Circuit), 260 Fed., 835-837;

McCaull-Dinsmore Co. v. Chicago etc. Ry. Co. (D. C.), 252 Fed., 654-667;

Alaska S. S. Co. v. U. S. (D. C.), 259 Fed., 713-715, 716, 718-722.

(8) The holding of the District Judge and the Circuit Court of Appeals below are in square accord with the ruling made by all the Courts before which the Cummins Amendment of March 4, 1915, has come for construction; and, as pointed out by the learned District Judge below, the passage of the later amendment of 1916, known as the "Second Cummins Amendment," emphasizes the correctness of the rulings below, which are now under attack.

Rulings of Hon. E. T. Sanford below. (Trans., pp. 38, 39.)

(9) We do not understand that the constitutionality of the Cummins Amendment of March 4, 1915, is under attack in the instant application. This amendment has been construed and administered by this Court in the case of *Chicago etc. Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S., 97-100, and of course it results from the opinion of this Court in the *Croninger* case, which upheld and construed the Carmack Amendment, as well as the previous opinions of this Court upholding the State statutes which declared full liability before the passage of the Carmack Amendment, that the Cummins Amendment of March 4, 1915, is unquestionably constitutional and valid legislation.

Adams Express Co. v. Croninger, 226 U. S., 491, 500;

Chicago M. & St. Paul Ry. v. Solan, 169 U. S., 133-137;

Pennsylvania R. R. Co. v. Hughes, 191 U. S., 477, 487, 491.

(10) By the act of August 9, 1916, Ch. 301, 39 Stat. L., 441, known as the "Second Cummins Amendment," the fourth from the last *proviso* of the Cummins Amendment of March 4, 1915, was amended so as to read as follows:

"Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses."

39 Stat. L., Ch. 301, p. 441.

Fed. Stat. Anno. Sup., 1918, pp. 387, 388.

The above mentioned Act of Congress of Aug. 9, 1916, Ch. 301, 39 Stat. L., 441, known as the Second Cummins Amendment, was before this Court for construction in a recent case.

American Ry. Express Co. v. A. J. Lindenburg, 67 L. Ed., 227-231; Adv. Opinions, pamphlet No. 7, Feb. 1, 1923.

CERTIORARI AND NOT WRIT OF ERROR IS THE APPROPRIATE REMEDY IN THIS CASE

In this case our adversaries have heretofore sued out a Writ of Error to the United States Circuit Court of Appeals of the Sixth Circuit; and a certified copy of the record and proceedings in the District Court below and in the said Circuit Court of Appeals has been filed with the Clerk of this Court, and is now pending as No. 865 of the October Term, 1922.

We quote the following from the Petition for the Writ of Certiorari in this case:

"Petitioner, doubting whether the face of the plaintiff's declaration sufficiently discloses the jurisdiction of the District Court rested upon questions arising under the Commerce Act, as well as diverse citizenship, files this petition for certiorari, in order that this Court may certainly have jurisdiction to review and determine the important public questions presented on the record in both Courts, and arising under the Commerce Act." (Petition for Certiorari, p. 2.)

It is very plain to us that from the face of plaintiff's declaration in the District Court below (and that is the controlling thing) this case is one wherein the jurisdiction was dependent entirely and alone upon diversity of citizenship. This being so, the judgment and holding of the Court of Appeals was *final*; and this being so, the only remedy now is by application for the Writ of Certiorari.

Judicial Code Sec's., 128, 239, 240;
36 Stat. L., 1133; 36 Stat. L., 1157;
26 Stat. L., 828.

That diversity of citizenship was the fact of jurisdiction in the District Court below was plainly averred in both the original and amended declarations, and was indeed made the subject matter of express stipulation in the District Court below. (Trans., pp. 1; 6, 7; 35.)

That plaintiff Darden, in his declaration, by merely referring to the Cummins Amendment of March 4, 1915, did not thereby primarily invoke the jurisdiction of the court under that Act of Congress, has been expressly ruled in effect by this Court.

Bankers Casualty Co. v. Minn., St. P. Ry. Co., 192 U. S., 371; 382-386;

Lovell, Trustee in Bankruptcy of Knight v. Newman & Son, 227 U. S., 412-426.

State of the Law when the Cummins Amendment of March 4, 1915, was Passed; and the Purpose and Scope of that Amendment.

As hereinbefore stated it was well settled by the decisions of this Court at an early day that a common carrier could not by contract exempt itself from liability for loss by negligence, and we have hereinbefore, under our proposition (1) in this Brief, cited the decided cases to that effect.

In the case of *Hart v. Pennsylvania Railroad*, 112 U. S., 331, it was clearly held and settled that a contract for limited liability by a common carrier to a shipper, when fairly made, did not contravene the settled principle of common law preventing the carrier from contracting against liability for its negligence. In this case, in summing up the view of the Court, it was said:

"The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is *fairly made*, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Squire v. New York Central R. R. Co.*, 98 Mass., 239, 245, and cases there cited."

112 U. S., 343.

The above case was followed by a long line of harmonious decisions construing limited liability contracts both before and after the Carmack Amendment.

The Carmack Amendment to the Hepburn Law, as amending Section 20 of the Act to Regulate Commerce, of February 4, 1887, for ready reference can be found printed in the margin of the report of the case of *Adams Express Co. v. Croninger*, 226 U. S., 503.

After the passage of the Carmack Amendment it was construed by this Court in a line of cases in connection with limited liability contracts, and these cases held that the Carmack Amendment, making the initial carrier liable not only for its own negli-

gence but the negligence of connecting carriers, did not operate to prevent the carrier from making a contract for limited liability, where the contract was fair, and the lower rate obtained by the shipper was obtained upon the faith of an agreed valuation of the property—notwithstanding the language of the Carmack Amendment that the carrier should be liable “for any loss, damage or injury” to the property “caused by it” or any connecting carrier. In other words, after the Carmack Amendment, this Court, speaking through Mr. Justice Lurton in the *Croninger Case*, continued to administer the principle announced in the *Hart Case*, and in the course of the opinion, quoting that case, said:

“The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It extracts from the carrier the measure of care due to the value agreed upon. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is *no deceit* practiced on the shipper, should be upheld.”

226 U. S., 510, 511.

Following the *Croninger Case* (226 U. S., 493) there were numerous other cases in which this Court administered the same rule in construing the Carmack Amendment.

Adams Ex. Co. v. Croninger, 226 U. S., 491;
Wells, Fargo & Co. v. Neiman-Marcus Co., 227 U. S., 469;
Kansas Sou. Ry. v. Carl, 227 U. S., 639;
M. K. & T. Ry. v. Harriman, 227 U. S., 657;
Chicago, R. I. & P. Ry. Co. v. Cramer, 232 U. S., 490;
Boston & Maine R. R. v. Hooker, 233 U. S., 97;
A. T. & S. F. Ry. v. Robinson, 233 U. S., 173;
Pierce Co. v. Wells, Fargo & Co., 236 U. S., 278-287.

Before the passage of the Carmack Amendment, many of the States enacted statutes or enforced common law rules declaring and holding the carrier liable for the full actual value of or damages to property destroyed or injured in transit, notwithstanding agreed valuation or attempted stipulation to the contrary in the bill of lading or contract of shipment; and these State statutes and rulings were uniformly upheld and sustained by this court.

In one case before this Court such an Iowa statute was upheld; in another, such a Pennsylvania ruling was upheld; and in the *Croninger* case the Court, speaking through Mr. Justice Lurton, declared that if the Kentucky statute involved in that case could still be regarded as controlling, it would result that the carrier was liable for the full valuation of the property, notwithstanding its agreed or declared value in the contract of shipment.

Pennsylvania R. R. Co. v. Hughes, 191 U. S., 477;

Chicago, Milwaukee etc. Ry. v. Solan, 169 U. S., 133;

Adams Express Co. v. Croninger, 226 U. S., 491, 501-513.

In the *Croninger* case, *supra*, it was held, however, that with the passage of the Carmack Amendment this Federal legislation superseded and rendered inoperative, so far as interstate shipments were concerned, all the statutes and common laws of the several States undertaking to declare full liability against common carriers, notwithstanding attempted limited liability contracts.

And it was to meet and obviate the above state and condition of the law resulting from the construction of the Carmack Amendment announced in the *Croninger* case, that the Cummins Amendment of March 4, 1915, was passed. The proceedings in Congress clearly and expressly show this; and the decisions of the Courts before which the Cummins Amendment of March 4, 1915, later came for construction and enforcement, expressly recognize and declare this to be true—as we shall later see.

In the original report of April 6, 1914, made by the Committee on Interstate Commerce to the Senate of the 63d Congress, Second Session (Report No. 407), recommending the passage of the Cummins Amendment in the form approved by said committee, it is stated:

“While at common law common carriers could not escape the consequences of their negligence by stipulating for a release of liability, either in whole or in part, yet the common law, as interpreted by the Supreme Court of the United States, and by the appellate court of some States, recognized as valid agreements between shippers and common carriers limiting the liability of the carrier to an agreed amount. In some cases the limitation was sustained on the theory that the shipper was estopped by his representations of value to claim a large amount, and in other cases upon the theory that the shipper had received a lower rate for the transportation of his property than would have been given him had

the actual value been stated. Many States have statutes forbidding such limitations and requiring carriers to respond in the full amount of loss, damage, or injury occasioned by their negligence, and in some States the courts of last resort construed the common law to forbid such limitation.

"The Supreme Court of the United States held in the case of the *Pennsylvania Railroad Co. v. Hughes*, (191 U. S., 477), that, notwithstanding it had held in many decisions to the contrary, the decision of the Supreme Court of Pennsylvania in that case to the effect that all agreements limiting the liability to less than the actual loss or damage were void at common law should govern and be affirmed, and in the case of *Solan v. Chicago, Milwaukee & St. Paul Railroad Co.*, (169 U. S., 133), the Supreme Court of the United States affirmed the decision of the Supreme Court of Iowa, which held valid a statute that forbade any limitation of the liability of a carrier for negligence and requiring it to pay full amount of loss, damage, or injury.

"The so-called Carmack Amendment, adopted in 1906, construed by the Supreme Court of the United States in the case of *Adams Express Co. v. Croninger*, and in other cases, had the effect of abrogating State laws forbidding limitations in bills of lading and receipts on the liability of carriers for negligence and consequent damage or injury to property transported in interstate commerce. The Amendment was held to be a Federal regulation of interstate commerce, dealing with the rights of carriers and shippers under bills of lading and not prescribing full liability for damage or injury to property transported in interstate commerce, and that limitations of recovery to less than actual loss or damage caused by the carrier in bills of lading or receipts are valid.

"It is, of course, necessary, where the property shipped is hidden from view by wrapping, that the representation as to value made by the shipper shall in all cases be binding upon him. This exception covers a large number of articles shipped in interstate commerce, and especially many of those carried by express companies."

Said Cummins Amendment, as same was reported by the Senate Committee on Interstate Commerce, was, however, amended on the floor of the Senate after considerable debate. These debates not only show in many connections what was shown by the report of the Senate Committee quoted above (that the Cummins Amendment was intended to meet and obviate the Croninger case, as this case had developed "defects" in the Carmack

Amendment), but also show the particular abuse by the carriers which made necessary the passage of the Cummins Amendment.

An examination of the Congressional Record of the 63d Congress, 2d Session, Vol. LI, at pages 9623 and 9624, shows that Senator Cummins, among other things, said:

"A man drives his carload of steers to town to send them to Chicago from my State, and there is put before him by the railroad company a bill of lading or a contract, which contains a declaration as to the value of those steers. The shipper signs that declaration. Of course, the declaration is well known to everybody to be false; I mean as to value. The shipper says the steers are worth \$25, or \$50 apiece; and the liability of the railroad company is limited to that amount. The shipper has no more chance to enter into an agreement with the railroad company upon even terms than a child would have in a wrestling match with a prize fighter."

And on the same page of this volume of the Congressional Record it appears that Senator Reed (who succeeded in having an amendment to the Act as reported by the Senate Committee adopted by the Senate, which amendment made the Act still more liberal to shippers, and still more restricted the power of the Interstate Commerce Commission in regard to establishing rates dependent upon value, and which amendment shaped up the *proviso* to the Cummins Amendment as it was finally passed by both houses, and signed by the President) had this to say:

"Mr. President: I think the difficulty here does not lie in the fact that a rising rate charge is imposed, but it lies in the fact that the railroad being given the power to fix a rising rate, uses that power in such a way as to practically *force a limitation on the liability* they incur; in other words, let us say the ordinary shipping rate is \$50 a car, and that that is a *fair rate*. They hand the shipper a contract limiting the liability to one-tenth of the real value; he has the option to sign that contract or to pay \$100 a car; *and by that device they force him to take the risk which the law seeks to impose upon them.*"

Cong. Rec., Senate, p. 9624.

In other words, the Cummins Amendment as the same was passed by the Congress and approved by the President, was enacted to prevent a carrier from doing just what the Express Company is endeavoring to accomplish in the case at bar—that is, practice a *device* which forces the shipper to take the risk

which the law seeks to impose on the carrier, while the carrier at the same time is receiving a reasonable and acceptable rate for the shipment.

We will next call your Honors' attention to the decided cases in which the Courts, including this Court, have had occasion to construe the Cummins Amendment of March 4, 1915, and in which effect has uniformly been given to the unambiguous and plain language of this Act of Congress, and in which the reasons for the passage of the Act and the abuses which it sought to remedy, are recognized and stated.

**McCaull-Dinsmore Co. v. Chicago, Etc.,
Ry. Co., 252 Fed., 664.**

The above case which came first before Morris, District Judge, in Minnesota, was decided August 23, 1918.

In the above case it was held that under the Cummins Amendment where wheat was lost in transit the carrier was liable for the value of the grain at the "point of destination"—notwithstanding the shipment was made under a contract known as a "Uniform Bill of Lading," which was part of the published tariffs filed with the Interstate Commerce Commission, and which provided that the loss should be computed on the value of the property—"at the time and place of shipment."

It will be observed that in the above case said tariffs provided among other things a rate of transportation based on and controlled by said bill of lading or contract; and said tariffs further provided that in cases where the shipper was not agreeable to shipping under the terms of said contract or bill of lading, then a *higher* rate of transportation was provided by said tariffs.

The District Court administered the Cummins Amendment according to its *clear terms*, and held the carrier liable for the full, actual loss, on the basis of the value of the grain at the point of *destination* as the common law required, notwithstanding the fact that the tariff had provided that the damages should be ascertained on the basis of the value at the time and place of the shipment if the cheaper rate was used by the shipper, and notwithstanding the fact that the shipper had shipped on said *cheaper rate*.

In the course of its opinion the Court, in speaking of the Cummins Amendment, said:

"This amendment was passed after the decision of the Supreme Court on the Carmack Amendment (Act June 29, 1906, c. 3591, Sec. 7, pars. 11, 12, 34 Stat., 595), cited by counsel had been rendered, and it is apparent from its language that its proposal and enactment were caused by these decisions, and that it was aimed directly at them. Viewed in the light of those decisions and of the purpose evidently sought to be accomplished, it is difficult to see how its language could be more sweeping:

"Shall be liable . . . for the full *actual loss* caused by it . . . notwithstanding *any limitation* (the italics are mine) of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and *any such limitation*, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void."

"This is the language of the amendment so far as it touches this case. The first proviso indicates the cases, of which this is not one, and the only cases, exempt from that language, and the only way in such cases of avoiding its terms, and thus *emphasizes*, and, if that were possible, makes more sweeping those terms. I do not see that it can make any difference under the language quoted that this bill of lading was provided for in the schedule of rates filed with the commission, and that that schedule of rates also provided another bill of lading under which, if issued and accepted, the rate would have been higher." 252 Fed., 665, 666.

And the Court, in the above case, held (just as his Honor the District Judge below held in the case at bar; Trans., pp. 38, 39, 40), that the Interstate Commerce Commission had been without power to make any ruling or approve any tariff which permitted a rate based on less than actual value, except in the particular cases specified in the Cummins Amendment, where the goods shipped were hidden and their nature was not disclosed to the carrier; and in this connection the Court said:

"From the foregoing simple statement, I do not see how it is possible to escape the conclusion, upon a fair and open-minded consideration of the language of the amendment and the obvious and well-known meaning of its terms, that

this provision or stipulation in the bill of lading is a limitation of the liability of the carrier and of the amount of recovery, and is therefore unlawful and void. In reaching this conclusion I have not failed to consider the very able argument of counsel for defendant, and also what has been said by the Interstate Commerce Commission, and it is with regret and not a little misgiving that I find myself in difference with men so able and experienced in such matters. But consider the matter as I may, I am always irresistibly brought back to this simple statement and to the necessary conclusion therefrom."

252 Fed., 666.

The above case came before the Circuit Court of Appeals of the Eighth Circuit and is reported under the style of—

**Chicago M. & St. P. Ry. Co. v. McCaull-
Dinsmore Co., 260 Fed., 835.**

The Circuit Court of Appeals of the Eighth Circuit, consisting of Hook and Stone, Circuit Judges, and Amidon, District Judge, affirmed the holding of the District Judge below. The Circuit Court of Appeals consumes by far the larger part of its opinion in merely quoting the language of the Cummins Amendment—and then the Court says, by way of answering an *identical argument* with that advanced by our learned adversaries in the case at bar:

"The railway seeks to avoid the application of this provision by contending that it, in the present instance, has not sought to limit its liability, but has, on the contrary, defined liability for the full, actual loss, and has by its tariffs thus crystallized the method of arriving at the actual loss. We deem such contention unsound. There was no uncertainty as to the time or place of estimating value under the rule of common law—it was the destination. The evident purpose of the provision in the bill of lading was not to introduce certainty, but to avoid the rule existing at law, for the obvious object of escaping a *higher valuation* which would often arise at destination. Such a provision is unquestionably a limitation, since it forbids application of the established rule."

260 Fed., 836.

And in the above case the Court concluded its opinion with the following:

"The Cummins Amendment was not concerned alone

with preventing contracts already illegal under the common law, but with prohibiting all agreements having the effect defined by that statute. Congress passed this act to remedy the defects in the Carmack Amendment (Act June 29, 1906, c 3591, sec. 7, pars. 11, 12, 34 Stat., 595, Comp. St., secs. 8604a, 8604aa)-as developed in the case of *Adams Express Co. v. Croninger*, 226 U. S., 491, 33 Sup. Ct., 148, 57 L. Ed., 314, 44 L. R. A. (N. S.), 257, and intended thereby to *fully and finally prevent all limitations of this character*. Congressional Record, 63d Congress, 3rd Session, Vol. 52, pp. 5446-5451."

260 Fed., 837.

The above case then finally came before this Court, and is reported under the style of

**Chicago, Etc., Ry. Co. v. McCaull-Dinsmore
Co., 253 U. S., 97-100.**

After a brief statement of the case and quoting certain terms and provisions of the Cummins Amendment, this court, speaking through Mr. Justice Holmes, commented upon the decisions of the Interstate Commerce Commission in upholding the provision and regulation in question, as contained in the tariff, both before and after the passage of the Cummins Amendment. In this connection this Court said:

"Before the passage of this amendment the Interstate Commerce Commission had upheld the clause in the bill of lading as in no way limiting the carrier's liability to less than the value of the goods but merely offering the most convenient way of finding the value. *Shaffer & Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 21 I. C. C., 8, 12. In a subsequent report upon the amendment it considered that the clause was still valid and not forbidden by the law, 33 I. C. C., 682, 693. The argument for the petitioner suggests that courts are bound by the Commission's determination that the rule is a reasonable one. But the question is of the *meaning of a statute* and upon that, of course, the courts must decide for themselves."

253 U. S., 99.

And then, by way of declaring that the language of the Cummins Amendment was very plain and explicit, and did not leave any basis for any argument grounded upon the history of the statute, or grounded upon convenience, or grounded upon the policy of the later Act of August 9, 1916, this Court said:

"We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily prevent a recovery of the full actual loss, and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule. But the question is how the contract operates upon this case. In this case it does prevent a recovery of the *full actual loss*, if it is enforced. The rule of the common law is not an arbitrary fiat but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions, which have been made and are not in question here. It seems to us, therefore, that the decision below was right, and as, in our opinion, the conclusion is required by the statute, *neither the convenience of the clause, nor any argument based upon the history of the statute or upon the policy of the later act of August 9, 1916, c. 301, 39 Stat., 441, can prevail against what we understand to be the meaning of the words. Those words seem not only to indicate a broad general purpose, but to apply specifically to this very case.*"

253 U. S., 99, 100.

Indeed, this Court had long before ruled that the *legal* conditions and limitations in a carrier's bill of lading duly filed with the Interstate Commerce Commission, are binding until changed by that body, but not so of conditions and limitations contained in such bill of lading which are illegal, and consequently void.

Boston & Maine R. R. v. Piper, 246 U. S., 439-445.

**Alaska S. S. Co. v. United States,
259 Fed., 713-722.**

The above case was an equity proceeding in the District Court for the Southern District of New York, before Ward, Circuit Judge, and Learned Hand and Mayer, District Judges. The majority of the Court held that the Interstate Commerce Commission had no power to prescribe the terms and provisions of bills of lading for either domestic or export business, and the opinion is a very clear and able one.

And while Learned Hand, District Judge, dissented from certain aspects of the opinion of the majority of the Court, his opinion was perfectly clear upon the proposition that the

Cummins Amendment necessarily took from the carrier any right to make any modification whatever of its common law duties in respect of cases coming within the terms of the Cummins Amendment. (259 Fed., 718, 719.)

From all the above, we respectfully submit that it is perfectly clear that the Cummins Amendment of March 4, 1915, was passed for the *purpose* of preventing, and the clear and explicit language of this Act of Congress *absolutely prevents* a carrier or transportation company, like the Express Company, from being able to escape liability for *full actual value* and damages in a case where it has "received property for transportation" from a point in the United States to a point in an adjacent foreign country, and the loss or damage to the shipment has been "caused by it" (the carrier), or any carrier to whom the shipment was delivered.

The Very Language of the Cummins Amendment of March 4, 1915, Answers Every Contention of Petitioner in This Case.

We have hereafter, for the convenience of the Court, set out the Cummins Amendment of March 4, 1915, in full (*Post*, pp. 50-52). We have endeavored to show the purposes for which this Act of Congress was passed, and the abuses which it sought to correct; and we have shown, we submit, that the Congress understood, and the Courts have recognized, that this Amendment was passed to obviate the state of the law resulting from the construction given by this Court in the *Croninger case* (226 U. S., 491), to the Carmack Amendment; and was passed for the purpose of *cutting in behind* all the questions sought to be made by our adversaries in the case at bar.

It will be noted, in the first place, that the Cummins Amendment of March 4, 1915, is leveled against any common carrier, railroad or transportation company subject to the provisions of the Act—"receiving property for transportation" in interstate movements, or from any point in the United States to a point in an adjacent foreign country.

The Express Company in the case at bar admittedly "received"—indeed, it is stipulated that it "received" Mr. Darden's

five race horses for transportation from Latonia, Ky., to Windsor, Canada. (Trans., pp. 35.)

Said Cummins Amendment next provides that any such common carrier or transportation company "*receiving* property for transportation" in the cases specified in the Act, shall issue a receipt or bill of lading therefor; and then the Act declares that such carrier "shall be liable to the lawful holder thereof for any loss, damage or injury to such property, caused by it"—or any connecting carrier to which it is delivered.

Admittedly in the case at bar the destruction of plaintiff's five race horses was caused by the *negligence* of the Express Company and its agent, the transporting Railroad Company to which these horses were delivered in their through movement from Latonia, Ky., to Windsor, Canada.

And after declaring liability as set out above (and in substantially the same language employed in the Carmack Amendment), the Cummins Amendment goes far beyond the Carmack Amendment, by declaring that

"no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier . . . from the liability hereby imposed."

And then, lest the intent of Congress might still not be perfectly plain, the Cummins Amendment then proceeds to declare that any such common carrier so *receiving* such property for such transportation—

"shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the *full actual loss, damage, or injury* to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass."

And lest it still might not be plain, the Amendment then declared that such liability for "full, actual loss," etc., should exist—

"notwithstanding any *limitation of liability* or *limitation of the amount of recovery* or *representation* or *agreement as to value* in any such receipt or bill of lading or in *any contract, rule, regulation, or in any tariff* filed with the In-

terstate Commerce Commission; and any such limitation, *without respect to the manner or form in which it is sought to be made*, is hereby declared to be unlawful and void."

The above explicit language of the Cummins Amendment, of course, answers every contention of our adversaries in the case at bar, we submit. It expressly and pointedly answers all their contentions in regard to the "contract" of shipment, by declaring full liability against the Express Company which "received" these horses for transportation, "notwithstanding" the terms and provisions of any "contract." And this full liability is declared notwithstanding the contents or provisions of any "tariff." And this full liability is declared notwithstanding "any limitation of liability," or any "limitation of the amount of recovery," or any "representaton or agreement as to value," in any "contract," rule, regulation, or in "any tariff filed with the Interstate Commerce Commission"; and the Act then declares that any such limitation "without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void."

If the Cummins Amendment of March 4, 1915, be valid and constitutional legislation, its plain and explicit terms extract all *merit and substance* from the instant application for certiorari, —we respectfully submit.

The Cummins Amendment of March 4, 1915, Is Constitutional.

We do not understand that our adversaries, or any other litigant, have ever quite screwed up their courage to the point of attacking the constitutionality of the Cummins Amendment. The nearest our adversaries ever got to such an attack was a statement on page 37 of their brief in the Court of Appeals below, where they said:

"The inherent right to base rates on value is as old as the right of common carriers to charge for transporting and insuring property. This *right* needed no 'authority' from Congress; the serious doubt is whether Congress could 'prohibit' this ancient practice."

Just why our adversaries thought there was any "serious doubt" about the power of Congress to pass this amendment is a matter about which they do not enlighten us. They fail to

point out any article or provision of the Constitution which they think was violated when this Act was passed, and consequently they are in the attitude of making no *legal* attack upon its constitutionality.

Any attack upon the constitutionality of the Cummins Amendment would appear completely to be answered by the language of the Court in dealing with the Carmack Amendment in the case of *Adams Express Company v. Croninger*, 226 U. S., 491-500, where the Court said:

"That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to *regulate contracts* between the shipper and the carrier of an interstate shipment by *defining the liability* of the carrier for loss, delay, injury or damage to such property, *needs neither argument nor citation of authority.*"

226 U. S., 500.

And as we have hereinbefore pointed out, before the passage of the Carmack Amendment this Court had uniformly sustained State statutes prohibiting the making of limited liability contracts by common carriers with their shippers, and declaring liability by such carriers for the full actual value of and damages to property lost, injured or destroyed in transit.

(Ante, p. 28.)

So we respectfully submit there is no merit in any *hint* which our adversaries undertake to throw out as to any alleged unconstitutionality of the Cummins Amendment as construed and administered in the Courts below in the instant case.

**Merchants' Cotton Press Co. v. N. A. Ins. Co.,
151 U. S., 368-388.**

We quote the following from the opinion delivered by Mr. Justice Jackson in the above case:

"The remaining assignment of error based upon the alleged allowance by the local agent of the railroad company of special rates, rebates, or drawbacks to Jones Brothers & Company which, it is claimed, rendered the bills of lading issued by the railroad company to the owners or consignees of the cotton void, so that the marine insurance companies, who had paid the losses, could have no right upon such bills

of lading against the railroad company, or the fire insurance companies, needs but little consideration. The Supreme Court of the State disposed of this question as follows: 'This fact of special rate and rebate is denied, and it is a matter of controversy and conflict of evidence, and it is also insisted in answer to this by plaintiffs that the interstate commerce law does not apply for the reason that the evidence disproves any 'common control' over the river and rail routes. We are of opinion, however, and rest our decision upon the ground that if it were assumed that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent.

The law makes *such agreements* as to rebate, etc., void, but does not make the contract of affreightment *otherwise* void, and we think there is nothing in the law or the policy of it which requires a construction that would excuse a carrier from *all liability* when it made such a contract in connection with that for *receipt and transportation of freight*. Such a construction would encourage rather than discourage such unlawful agreements for rebates. *The carrier might prefer them to liability for the freight*. Such a contract as to rebate would be void, and . . . could not be enforced; *but we think the shipper could nevertheless recover for loss of his freight through the carrier's negligence and, incidentally, of carrier's insurance*. No different construction has yet been put upon the interstate commerce law so far as we are advised, and we decline to give it any other.' We concur in the correctness of this conclusion of the State Supreme Court."

151 U. S., 387, 388.

In *Rose's Notes on United States Reports* (Rev. Ed.), Vol. 16, p. 783, will be found cited many decisions approving and concurring in the above holding.

At page 784 of the same volume of *Rose's Notes, Chicago etc. R. R. v. Kirby*, 225 U. S., 166, is cited as disapproving the opinion of Mr. Justice Jackson above quoted. This is erroneous, and said *Kirby* case does not disapprove said opinion and holding. We quote the following from the opinion in the *Kirby* case, which is all the opinion contains in regard to the previous opinion of the Court, speaking through Mr. Justice Jackson, in the 151 U. S. case above referred to:

"The claim that the defendant in error may recover upon the carrier's contract, stripped of the illegality, under *Merchant's Cotton Press Co. v. Insurance Co.*, 151 U. S.,

368, is not presented by this record. The declaration counted only upon the breach of a special contract which was illegal. There was no count *based upon the carrier's liability for negligence* in not promptly shipping and delivering. The judgment was rested upon the damages resulting from the breach of the special contract, and not at all upon the liability of the carrier otherwise."

225 U. S., 166.

In the case at bar the plaintiff expressly declared, in both the original and the amended declarations upon the *negligence* of the Express Company which wrought the destruction of his property (Trans., pp. 3-5; 8-11); and this negligence is not now denied.

And the Court of Appeals for the Sixth Circuit in the case at bar but quotes with approval and follows the said decision of this Court, speaking through Mr. Justice Jackson, in *Merchant's Cotton Press Co. v. Insurance Co.*, 151 U. S., 368, 387, 388. (Trans., pp. 48, 50-53.)

The Opinion of the United States Circuit Court of Appeals in This Case.

The opinion of the learned Circuit Court of Appeals for the Sixth Circuit, in the case at bar, is in the record. (Trans., pp. 48-53.)

Upon the grounds on which said Court rests its opinion and holding, the same is obviously sound. But we respectfully call attention of your Honors to the language of the Cummins Amendment of March 4, 1915, wherein full actual loss, damage and liability is declared—

"notwithstanding any limitation of liability or limitation of the amount of recovery, or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void."

The above language is very plain. It cannot be misunderstood or misconstrued by anyone, we respectfully submit.

All the provisions and requirements of the Act or Congress

in respect of penalties for undue discriminations, etc., are untouched by the Cummins Amendment of March 4, 1915.

The public policy of our nation was conclusively declared by the terms of said Cummins Amendment of March 4, 1915. If its terms are to any degree inconsistent with previous Acts of Congress, then, nevertheless, its terms and provisions are clear and unmistakable, and previous inconsistent enactments could not control the instant controversy.

For all reasons stated we insist that there is no merit or substance in the instant application for the writ of Certiorari, and that same should be dismissed.

Respectfully submitted,

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APPENDIX "A."

The Cummins Amendment of March 4, 1915.

The original Interstate Commerce Act of February 4, 1887, 24 Stat., 379 c. 104, was extensively amended by the Act of June 29, 1906, 34 Stat., 584 c. 3591, known as the Hepburn law. In Section 7 of this last mentioned act of 1906 there was incorporated an amendment, known as the Carmack Amendment, to Section 20 of the original Interstate Commerce Act of 1887.

For ready reference, the Carmack Amendment can be found printed in the lower margin of the report of the case of *Adams Express Company v. Croninger*, 226 U. S., 503.

The Cummins Amendment of March 4, 1915, effective 90 days after its passage, was in the form of an Amendment to the Carmack Amendment to the Hepburn Act, and said Cummins Amendment in its *entirety* is as follows:

The Cummins Amendment.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That so much of Section 7 of an Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February 4, 1887, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29, 1906, as reads as follows, to-wit:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State, shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," be, and the same is hereby, amended so as to read as follows, to-wit:

"That any common carrier, railroad, or transportation company, subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided, however,* That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided, further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of ac-

tion which he has under the existing law: *Provided, further*, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however*, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.

"SEC. 2. That this Act shall take effect and be in force from ninety days after its passage."

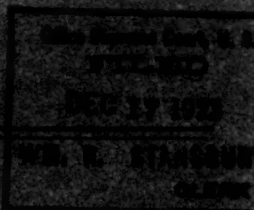
"Approved March 4, 1915."

38 Stat. L., 1196, 1197.

Fed. St. Anno. Sup., 1916, pp. 124, 125.

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IN THE

United States Supreme Court

OCTOBER TERM, 1923.

No. 228.

ADAMS EXPRESS COMPANY, *Plaintiff in Error.*

W. W. DARDEN, *Defendant in Error.*

IN ERROR TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STOCKTON & STOCKTON,
of Counsel.

MAXWELL & BARRETT,
RANK & GIBB,
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IN THE
United States Supreme Court

OCTOBER TERM, 1923.

No. 226.

ADAMS EXPRESS COMPANY, *Plaintiff in Error,*

vs.

W. W. DARDEN, *Defendant in Error.*

**STATEMENT, BRIEF AND ARGUMENT
FOR PLAINTIFF IN ERROR.**

STATEMENT.

May it Please Your Honors:

The defendant in error, a shipper, recovered judgment against the plaintiff in error, a carrier, for the value of race horses lost in transit from Kentucky to Canada.

Among other defenses, the carrier insisted the court should not allow parol evidence to vary the terms of the shipping contract, which had been prescribed by the Commerce Commission, and made a part of the filed and published tariffs, and which greatly increased the amount of the verdict; the value stated in the contract was \$500.00, and that testified to by the shipper was more than \$50,000.00.

In the absence of parol evidence, it is conceded the shipper is entitled to recover the value of the horses stated in the

shipping contract, all questions of negligence having been ended by the verdict of the jury.

However, permitting parol evidence to contradict the value stated in the shipping contract, and on which the transportation charge was based, revealed the giving by the carrier, and the acceptance by the shipper, of a rebate in violation of the Commerce Act, and the filed and published tariffs, under which the shipment was made; the "device" resorted to being to undervalue the shipment and apply the rate to this undervaluation instead of actual value, as required by the filed tariffs and Act of Congress.

The inquiry therefore in this court is narrowed to these two questions of law—whether a shipper will be permitted to vary by parol evidence the written terms of a shipping contract made as prescribed by law; and, if such evidence, when admitted, shows the shipper to have received a rebate in violation of law, will such illegal contract be enforced for his benefit?

The material facts, and stated by the shipper, are:

He "had been engaged in breeding, developing, shipping and racing horses for twenty years prior to July, 1915; and had shipped and raced horses to and on practically all the tracks in the United States, Canada and Mexico; was familiar with the way and manner in which it was then customary to ship thoroughbred horses by express;" had shipped those particular horses from Nashville to Louisville, by freight, and knew he was limiting his recovery to a nominal amount in the event of loss. (Trans. pp. 16-17.)

The shipment was started at Latonia, Kentucky, on July 7, 1915, and about ten days previous he spoke to the carrier's agent, who agreed to furnish a car, and "told him the rate was \$165.00 per car;" that it was arranged plaintiff would have one-half of the car and Seamster and others the other

half, and that he would leave his check for \$82.50 for his one half of the car with his trainer, Henry Loudon, as he (shipper) was going to Tennessee that night; that the agent took down the names of the three attendants who were to accompany the horses, "which included Henry Loudon, his trainer and the man in charge of his horses in his absence." (Trans. pp. 17, 18.)

Henry Loudon says "he was present and loaded plaintiff's horses on the car on the evening of July 7, 1915, and that Seamster made out the contract and that plaintiff (shipper) left with him a check to give to 'Mr. Seamster . . . or whoever was going to pay for the car'; that Seamster 'fixed the contract up', and he, Loudon, gave to the express agent who was making out the contract there at the car after the horses were loaded the check left with him by plaintiff; that while he did not sign this shipping contract, the witness was then asked: 'Did you ever see this contract before that you know of?' Answer, 'No, sir, not that one. I have seen lots like it.' 'Have you seen contracts like this?' Answer, 'Yes, sir, very often'." (Trans. p. 21.)

He exhibited the shipping contract, and there was made an exhibit to his testimony the filed tariffs. (Trans. pp. 22-33.)

The shipping contract (Trans. p. 22), the order of the Commission (Trans. p. 29), and the filed tariffs required the actual value of the shipment to be stated; and the shipping contract showed the rate to be charged, and required the shipper to state actual value, the rate being 1% of value.

When the shipper offered parol evidence of a contract, the carrier objected (Trans. pp. 20 and 36), and he was permitted by the court to say he valued his horses that were killed in this wreck as follows:

"Dortch, \$25,000; Little Father, 'anywhere from \$12,500 to \$15,000'; Margaret D., '\$5,000 to \$6,000'; Red Coat, '\$7,500 to \$9,000'; Green Horn, \$2,000; that within a

week before the horses were killed Margaret D. had been entered in a selling race at a value less than \$800.00 and had not won the race; that the year before Little Father, which was a six year old gelding when killed, had been entered in a selling race at a value of \$1,000, and had won the race, and had been put up and sold and bought in by himself for a sum less than \$1,500; that Green Horn had never started in a race, but had shown up well in *private* trials; that in selling races the horse of the least value carries the least weight, and that it was a *courtesy* among race horse people not to take advantage of a horse owner who entered his horse at a small value and won the race, *although* under racing rules any one having a horse in the race would have the right to have the horse put up and sold at auction—the association getting one half of the price above the price for which he was entered and the other one half to the owner." (Trans. pp. 20-21.)

While the express agent did not attempt to ascertain the value of the shipment, *yet* this *experienced* shipper knew these horses were not to be correctly valued, and that the express agent could not obtain their value, since two of the five horses had never raced in public, and what they could do was only known to their owner, who says one had "shown up well in *private* trials." (Trans. p. 20.)

The trial judge not only allowed the written contract to be varied by parol evidence, but held it was not "unlawful" for such an *experienced* shipper to undervalue his property to secure a low rate, and then recover full value, in the event of loss, *although* such conduct violated the filed and published tariffs. This holding results from, we respectfully submit, an untenable construction of the Act of March 4, 1915 (38 Stat. 1196), called the "Cummins Amendment," which merely forbids a carrier limiting the *amount* of its common law liability, and does not repeal the provisions of the Commerce Act making it "unlawful" to give, or accept a rebate, or depart from the filed and published tariffs.

There was a judgment for the shipper for \$32,500. (Trans. p. 14.)

The questions assigned as error in this court, were properly raised, overruled and exceptions taken in the trial court.

When parol evidence was offered to supplement and vary the terms of the shipping contract objection was made and overruled. (Trans. pp. 18-19.)

At the conclusion of plaintiff's evidence objection was again made, and motion made to exclude such evidence, which was again denied. (Trans. p. 36.)

Thereupon motion was made to dismiss the plaintiff's suit because he had disclosed its illegality, having stated facts showing the acceptance of a rebate, made unlawful by the Commerce Act, and in violation of the tariffs, and this motion was overruled, and exception taken. (Trans. p. 36.)

At the conclusion of all the evidence these motions were renewed, and again denied. (Trans. p. 37.)

The view of the trial judge shows the questions assigned as error, were fairly presented, and denied in the trial court. (Trans. pp. 38-39.)

Motion for a new trial was duly made and overruled (Trans. pp. 40-42), and proper steps taken to remove the case to the Circuit Court of Appeals for review.

That Court affirmed the judgment of the Trial Court, and handed down an opinion. (Trans. p. 48.)

ASSIGNMENT OF ERRORS.

The Circuit Court of Appeals erred in not holding the Trial Court erred in the following particulars:

I. In refusing to grant defendant's motion, made at the conclusion of the plaintiff's testimony, which motion was:

"The defendant moves the Court to withdraw and exclude from the consideration of the jury all evidence relating to the question of the value of the horses involved in this suit being contained in the testimony of plaintiff W. W. Darden, E. R. Bradley and K. Spence, on the ground that said evidence tends to vary the terms and provisions of the written contract of shipment introduced by the plaintiff as evidence in this case, and also tends to vary the written terms of the contract prescribed by the Interstate Commerce Commission in the filed and published tariffs under which this shipment is made."

II. In refusing to grant the defendant's motion, made at the conclusion of plaintiff's evidence, as follows:

"Comes the defendant and moves the Court to withdraw and exclude from the consideration of the jury all evidence offered on behalf of the plaintiff tending to show any agreement, understanding or promise on the part of defendant's agent to furnish the plaintiff with any particular kind of car on any particular date, upon the ground that such evidence tends to vary the terms and provisions of the published tariffs filed with the Interstate Commerce Commission and which govern the shipment in question. This evidence was in the testimony of the plaintiff himself, wherein he testified that the defendant's agent agreed to furnish him with a steel car, etc."

III. In refusing defendant's motion, made at the conclusion of all the evidence, as follows:

"Comes the defendant and renews its motion, made at the conclusion of the plaintiff's testimony in this cause to dismiss the plaintiff's suit because the plaintiff had by his own testimony disclosed to the Court the illegality in the contract upon which his suit was based, in that it appears that the plaintiff shipped his horses on a valuation which was less than actual value, and resulted in the plaintiff receiving a rebate for the shipment of his horses, con-

trary to the filed and published tariffs governing this shipment."

IV. In refusing to grant defendant's motion, made at the conclusion of all the evidence, as follows:

"Comes the defendant and moves the Court to direct the jury to return a verdict for the defendant, because:

(a) The plaintiff by his own testimony disclosed to the court the illegality in the contract upon which his suit is based, in that it appears the plaintiff shipped his horses on a valuation which was less than actual value, and resulted in the plaintiff receiving a rebate for the shipment of his horses, contrary to the filed and published tariffs governing the shipment.

(b) Because it appears from the plaintiff's declaration, and the evidence offered on behalf of the plaintiff, that he based his suit on an alleged oral contract, entered into between the plaintiff and an agent of the defendant, which oral contract is not permissible under, and is contrary to the published tariffs filed with the Interstate Commerce Commission, and is, therefore, illegal and void and cannot be made the basis of a recovery.

(c) Because the contract entered into between the plaintiff and the agent of the defendant, under which the shipment of horses was made, is in violation of the statutes of the United States and therefore, illegal and void and cannot form the basis for a recovery in favor of the plaintiff, in that they are not in accordance with filed and published tariffs such as are required by the statutes governing the transportation of interstate commerce."

V. In denying this defendant's motion for a new trial.
(Trans. p. 15.)

BRIEF.

The Interstate Commerce Act Makes Rebating Unlawful.

The original Commerce Act of February 4, 1887 (24 Stat. 379), made it unlawful for a *common carrier* to deviate from the published rates and charges.

The amending Act of March 2, 1889 (25 Stat. 857), made the *shipper*, who knowingly and wilfully obtained transportation at less than the regular rate, *guilty of fraud*.

The amending Act of February 19, 1903 (32 Stat. 847—the Elkins Act), says “it shall be unlawful for any person . . . to accept or receive any rebate . . . whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs;” and any person who accepts or receives such rebate shall be guilty of a misdemeanor and punished.

The imposition aimed at in the Act of March 2, 1889, “was principally such as might be practiced by the shippers upon the carriers in order to procure the preference.” But the purpose of the Act of February 19, 1903, was “to reach all means and methods by which the unlawful preference of rebate, concession, or discrimination is offered, granted, given or received;” and was not limited to “the obtaining of such preferences by *fraudulent* schemes or devices, or to those operating only by *dishonest, underhanded* methods.” And “this Act is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered.”

Armour Packing Co. vs. U. S., 209 U. S. 69;
U. S. vs. Union Mfg. Co., 240 U. S. 610.

“The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that

the only rate charged to any shipper for the same service, under the same conditions, should be the one established, published, and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

Armour Packing Co. vs. U. S., 209 U. S. 72.

The purpose of the Congress in prohibiting rebating and unjust preferences, in whatever form attempted, or device resorted to, is based "upon grounds of public policy, and for the protection of third parties."

L. & N. R. Co. vs. Mottley, 219 U. S. 478.

Requirements of the Law.

Every shipper is charged with notice of rates and regulations published and on file with the Interstate Commerce Commission.

Southern R. Co. vs. Prescott, 240 U. S. 632;

L. & N. R. Co. vs. Maxwell, 237 U. S. 94;

Boston & M. R. Co. vs. Hooker, 233 U. S. 97;

Kansas City R. Co. vs. Carl, 227 U. S. 639.

"The tariff, so long as it was in force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike."

Penn. R. Co. vs. Coal Co., 230 U. S. 197;

Poor vs. C. B. & Q. Ry. Co., 12 I. C. C. 422.

It is the duty of a carrier to collect, and of a shipper to pay such rates, and to adhere to such regulations as are prescribed in the published tariffs.

Dayton etc. vs. Cincinnati etc. Co., 239 U. S. 446;

Kansas City etc. Co. vs. Commission Co., 223 U. S. 573;

Macon etc. Co. vs. Atlantic etc. Co., 215 U. S. 501.

Since the Commerce Act forbids carriers remitting, in any manner, or by any device, any portion of the published tariffs, the courts have declared all contracts or special arrangements in conflict with, or in contravention of the published tariffs, rules and regulations, "unlawful" and void.

Southern R. Co. vs. Prescott, 240 U. S. 632;
Atchison etc. R. Co. vs. Moore, 233 U. S. 182;
Atchison etc. R. Co. vs. Robinson, 233 U. S. 173;
Chicago & A. R. Co. vs. Kirby, 225 U. S. 155.

The Commerce Act requires the published tariffs to state the classification of freight, all terminal, storage, icing, and other charges which the commission may require; to include all privileges or facilities granted or allowed; show all rules or regulations which in any wise affect, change or determine any part of, or the aggregate of rates and charges, or the value of the services to be rendered.

Loomis vs. Lehigh Valley R. Co., 240 U. S. 43;
Boston & M. R. Co. vs. Hooker, 233 U. S. 97;
U. S. vs. B. & O. R. Co., 231 U. S. 274;
Adams Express Co. vs. Croninger, 226 U. S. 491.

This rule embodies the policy which has been adopted by Congress in the regulation of interstate shipments in order to prevent unjust discriminations.

Cincinnati etc. R. Co. vs. Rankin, 241 U. S. 319;
U. S. vs. Union Mfg. Co., 240 U. S. 605;
N. Y. etc. Co. vs. Peninsular Produce etc., 240 U. S. 34.

Value as Affecting Rates and Rebating.

"When the carrier graduates its rates by value, and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate."

Missouri K. & T. Ry. vs. Harriman, 227 U. S. 671.

The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station.

Texas & P. R. Co. vs. Mugg, 202 U. S. 242;
Chicago & A. R. Co. vs. Kirby, 225 U. S. 155.
Kansas City etc. Ry. vs. Carl, 227 U. S. 652.

See also:

Boston & M. R. Co. vs. Hooker, 233 U. S. 106;
Hart vs. Pennsylvania R. Co., 112 U. S. 337;
Adams Express Co. vs. Croninger, 226 U. S. 508;
Wells F. Co. vs. Neiman-Marcus Co., 227 U. S. 476.

Limited Liability Contracts.

Where it is lawful for a shipper to declare a value different from *actual* value, the carrier may, by contract, limit its liability and the rate to the *declared* value.

“But so long as the tariff rate, based on value, remained operative, it was binding upon the shipper and carrier alike, and was to be enforced by the courts in fixing the rights and liabilities of the parties . . . If no value is stated, the tariff rate applicable to such a state of fact applies. If, on the other hand, there are alternative rates based on value, and the shipper names a value to secure the lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that class, and if sued for their loss it is liable only for the loss of what the shipper had declared them to be in class and value.”

Great N. R. Co. vs. O'Connor, 232 U. S. 508.

. . . “But in 1906 Congress passed the Hepburn bill, which established in interstate commerce a uniform rule of liability. That rule of liability is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment, and if a regularly

filed tariff offers two rates, based on value, and the goods are forwarded at the low value in order to secure the low rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property."

Chicago R. Co. vs. Cramer, 232 U. S. 493.

See also:

Penn. R. Co. vs. Hughes, 191 U. S. 488;

Adams Express Co. vs. Croninger, 226 U. S. 491;

Wells F. Co. vs. Neiman-Marcus Co., 227 U. S. 469;

Kansas City R. Co. vs. Carl, 227 U. S. 639.

Declaring a Low Value to Secure a Low Rate.

Prior to June, 1915, a shipper could declare any value less than actual value to secure a less rate; and *shipping* value bore no relation to *actual* value.

Adams Express Co. vs. Croninger, 226 U. S. 491;

Pierce etc. vs. Express Co., 236 U. S. 278.

The Carmack Amendment.

The Act of June 29, 1906 (34 Stat. 595—Carmack Amendment), prohibits a carrier *limiting* its liability to point short of destination.

Atlantic etc. R. Co. vs. Riverside Mills, 219 U. S. 194.

This Amendment withdrew all authority of the States over interstate shipments; and contracts limiting the *amount* of the carrier's liability to a declared value, *less* than *actual* value, made to adjust the rate, was held to be legal.

Adams Express Co. vs. Croninger, 226 U. S. 491;

Pierce etc. vs. Express Co., 236 U. S. 239.

In the *Croninger* case it was insisted the "broad language" of the "Carmack Amendment" *created* liability. However, the Court held the amendment did not *create* liability, or *change* common law liability,—it merely *prohibited* a limita-

tion, by contract, of common law liability to point short of destination.

Also: *Missouri etc. R. Co. vs. Harriman*, 237 U. S. 672.

The First Cummins Amendment.

The Act of March 4, 1915 (38 Stat. 1196,—First Cummins Amendment), amended the Act of June 29, 1906 (34 Stat. 595—Carmack Amendment), by further prohibiting a carrier, as to certain kinds of property, *limiting*, by contract, the *amount* of its liability, in the event of liability.

The Congress, in using the "broad language" of the "Carmack Amendment" in the "Cummins Amendment," did not *create* liability, or *change* common law liability; it merely *prohibited* a limitation, by contract, of the *amount* of common law liability, in the event of liability.

Neither the Carmack nor the Cummins Amendment *creates* any thing; both are negative, and merely *prohibit* a contractual change of common law liability—one as to distance, and the other as to amount.

Chicago etc. R. Co. vs. McCaull-D. Co., 252 Fed. 664;
260 Fed. 835; 253 U. S. 97;

U. S. vs. Alaska Steamship Co., 259 Fed. 713;

In re Cummins Amendment, 33 I. C. C. 682;

In re Bills of Lading, 52 I. C. C. 708.

After the passage of the First Cummins Amendment, the Interstate Commerce Commission withdrew permission for carriers to adjust rates to a *shipping*, or *declared* value, and *required* rates to be charged according to *actual* value.

It was while this First Cummins Amendment was in force the matters in this action arose.

The Second Cummins Amendment.

The Act of August 9, 1916 (39 Stat. 441—Second Cummins Amendment), amended the Act of March 4, 1915 (38 Stat. 1196—First Cummins Amendment), so as to allow rates to be based upon a *shipping* value on all property except ordinary livestock, excluding stock used chiefly for racing, breeding or show purposes; and further provided that as to such ordinary livestock there should be no rates based on "declared" value; and the Commerce Commission classified such property, and applied a flat rate, without reference to the value of the shipment.

Construction of Amendments.

Reports of committees of the House or Senate may be consulted in ascertaining the motive of Congress in adopting a statute.

McLean vs. U. S., 226 U. S. 374;

Lapina vs. Williams, 232 U. S. 78.

Subsequent legislation may be considered as an aid in construing prior legislation upon the same subject.

Tiger vs. Western Invest. Co., 221 U. S. 286.

An amendment to a statute operates precisely as if the subject-matter of the amendment had been incorporated in the amended act at the time of its passage.

Black on Interpretation of Laws, 357.

The construction by officers charged with the enforcement of a statute is entitled to great weight.

Robinson vs. Downing, 127 U. S. 607;

U. S. vs. Healey, 160 U. S. 135;

U. S. vs. Cerecedo, 209 U. S. 339.

An amendment must be construed in harmony with, and as promoting the main purpose of the act it amends.

Texas & P. R. Co. vs. Abirlene Co., 204 U. S. 446;

Adams Express Co. vs. Croninger, 226 U. S. 507.

"Being amendments of the Interstate Commerce Act, they are to be read in connection with it and with other amendments of it."

Texas vs. Eastern Texas R. Co., 258 U. S. 204.

Illegal Contracts.

If the contract of shipment is illegal, no alleged rights connected with it will be enforced by the courts.

Chicago & Alton R. Co. vs. Kirby, 225 U. S. 155;

Illinois Co. vs. Messina, 240 U. S. 395;

Harriman vs. Northern Securities Co., 197 U. S. 244.

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract."

McMullen vs. Hoffman, 174 U. S. 654.

"There can be no doubt, we think, under the construction given the Interstate Commerce Act (Act Feb'y. 4, 1887, c. 104, 24 Stat. 379, U. S. Comp. St. 1901, p. 3154) by the Federal Courts, that every person dealing with an interstate carrier is as effectually bound by the law and the orders of the Commission, as to both freight and passenger tariffs, as is the carrier himself. To hold that either party under any conditions may be estopped from asserting the illegality and invalidity of a contract made in violation of the interstate law and the orders of the Commission, would afford an easy means for its evasion, and might result in its practical annulment."

Melody vs. Great N. R. Co., 25 So. Dakota, 606,
(referred to in *Boston & M. R. Co. vs. Hooker*,
209 Mass. 598, and by the Supreme Court in 233
U. S. 113).

"In Pomeroy on Contracts, Sec. 280 (Specific Performance), after observing that an illegal contract cannot be made the basis of any judicial proceeding, and that no

action in law or equity could be maintained upon it, it was said: "This impossibility of enforcement exists, whether the agreement is illegal in its inception, or whether, being valid when made, the illegality has been created by a subsequent statute'."

Louisville & N. R. Co. vs. Mottley, 219 U. S. 484.

No action can be maintained where plaintiff must invoke aid from an illegal contract to make out a case:

Miller vs. Ammon, 145 U. S. 421;

Connolly vs. Union Sewer Pipe Co., 184 U. S. 540;

Chesapeake Co. vs. Maysville Co., 132 Ky. 643;

Gerber vs. Wabash R. Co., 63 Mo. App. 145;

Raleigh & G. R. Co. vs. Swanson, 102 Ga. 754, 39 L. R. A. 275;

Baltimore & O. R. Co. vs. Hamberger, 155 Fed. 849;

Savannah F. & W. R. Co. vs. Bundick, 94 Ga. 775, 5 Inters. Com. Rep. 289;

Chicago etc. R. Co. vs. Kirby, 225 U. S. 155;

Gulf etc. R. Co. vs. Hifley, 158 U. S. 98;

Texas & P. R. Co. vs. Mugg, 202 U. S. 242.

Remedy Afforded Innocent Shipper.

While a shipping contract, which violates the Act of Congress, or the filed and published tariffs, is declared by statute to be "unlawful," and, therefore, unenforceable, yet an innocent shipper, who has been imposed upon by a carrier, may sue under Sections 8 and 9 of the Act of Feby. 4, 1887 (24 Stat. 382).

Penn. R. Co. vs. Jacoby & Co., 242 U. S. 89;

Penn. R. Co. vs. Sonman Co., 242 U. S. 120;

Morrisdale Co. vs. Penn. R. Co., 230 U. S. 304;

Spiegle vs. Southern Ry., 32 I. C. C. 687;

Schloss-S. Co. vs. Railroad, 40 I. C. C. 743.

The Shipping Contract May Not Be Varied By Parol Evidence.

The Commerce Act requires the shipping contract to be in writing.

Act of June 29, 1906, "Carmack Amendment."

Act of March 4, 1915, "Cummins Amendment."

Cin. etc. Co. vs. Rankin, 241 U. S. 319;

New York etc. Co. vs. Beaham, 242 U. S. 151.

The filed and published tariff prescribed the form of shipping contract used in this case. (Trans. p. 29).

That contract, being in writing under the requirement of the statute and the order of the Commerce Commission, may not be varied by parol evidence.

Atchison etc. Co. vs. Robinson, 233 U. S. 180;

Blish Milling Co. vs. Railroad, 241 U. S. 197;

Southern R. Co. vs. Prescott, 240 U. S. 638.

The rights of the parties are such as are shown by the shipping contract; and the shipper will not be allowed to vary its terms for the purpose of showing a *recovery* value in excess of the *shipping* value, and upon which the rate was adjusted.

Even under common law rules a bill of lading, in so far as it is a contract, cannot be varied by parol evidence.

Porter Law of Bills of Lading, Article 14;

Higgins vs. U. S. M. S. Co., 3 Blatchf. (U. S. C. C.)
282;

Grace vs. Insurance Co., 109 U. S. 278;

The Delaware, 14 Wall. 579.

"To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a *recovery* in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations, and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies."

American Ry. Ex. Co. vs. Lindenburg, 260 U. S. 592.

Unless the shipper grounds his right of action on the shipping contract, required by statute and prescribed by the Commission in the tariffs, he states no *legal* cause of action.

Chicago & A. R. Co. vs. Kirby, 225 U. S. 155;

Blish Milling Co. vs. Railroad, 241 U. S. 197.

ARGUMENT.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on January 9, 1923, and a writ of error allowed on January 29, 1923. That it is authorized appears from the following:

The writ of error was sued out, and is permissible under the Judicial Code; Section 241 confers upon this Court jurisdiction to review cases determined in the Circuit Court of Appeals where the judgment of that Court is not made final.

Section 128 makes the judgment of the Circuit Court of Appeals final only where original jurisdiction depended "entirely" upon diverse citizenship.

Sub-section 8 of Section 24 gives to District Courts jurisdiction "of all suits and proceedings arising under any law regulating commerce"

Obviously, under these sections, the original jurisdiction of the District Court determines the jurisdiction of this Court upon this writ of error.

That the original jurisdiction of the District Court involved "proceedings arising under" the Commerce Act is, we think, shown by an excerpt from the declaration:

"Defendant Adams Express Company, a citizen and resident of the State of New York as aforesaid, is an express company which, as a common carrier for hire, makes contracts for the shipment and transportation by it, and ships property through many states of the United States; and defendant The Pennsylvania Railroad Company, a citizen and resident of the State of Pennsylvania as aforesaid, as a common carrier of freight and passengers for hire, owns and operates a steam commercial railroad between, into and through several states of the United States; and both defendants Adams Express Company and the Pennsylvania Railroad Company, on July 7, 1915, and for a long time prior thereto, were common carriers, railroads or transportation companies subject to the provisions of an Act of the

Congress of the United States of America entitled 'An Act to Regulate Commerce,' passed February 4, 1887, and other Acts of said Congress amendatory thereof, and particularly an Act passed March 4, 1915.'" (Trans. p. 1.)

Not only did the declarations set up a case involving "proceedings arising under" the Commerce Act, but it specifically called attention to that portion of the Act, which is applicable to this controversy, to-wit: "An Act passed March 4, 1915," a proper construction of which it is claimed determines the controversy in this case.

From the inception of this case to the present time the main issue has been a proper construction of the Act of March 4, 1915, known as the first "Cummins Amendment;" and it is the shield behind which Defendant in Error claims immunity from his "unlawful" conduct.

For these reasons it is believed the original jurisdiction of the District Court did not depend "entirely" upon diverse citizenship, and therefore the judgment of the Circuit Court of Appeals is not made final by the Judicial Code, and a writ of error to that Court is authorized.

L. & N. R. Co. vs. Rice, 247 U. S. 201.

And, finally, it may be said defendant in error has from the filing of his complaint in this action contended the "Cummins Amendment" to the Commerce Act authorized recovery against plaintiff in error, but now denies the Act was sufficiently involved to confer jurisdiction upon the Court. It is submitted he should not be allowed to hold to both.

Petition for Certiorari.

If, however, the writ of error is not authorized under the facts of this record, a petition for *certiorari* is still pending, and was filed within the time, and in accordance with the rules of this Court.

Further argument upon whether the jurisdiction of this Court is present, under the writ of error, or the *certiorari*, will be of no assistance to the Court, and would unnecessarily lengthen this brief.

For this reason the merits of the controversy will be discussed, first as they were determined in the Trial Court, and then in the Court of Appeals.

The Cummins Amendment to the Interstate Commerce Act.

The Trial Judge said:

"I have carefully considered the Cummins Amendment, and I am unable to avoid the conclusion that it intended to make the carrier liable for the full value of the property, regardless of any limitation in the receipt, bill of lading or tariff, save in the one case where the goods were hidden in the package, where the carrier might require the shipper to state the value, and the shipper would be limited to that value. I cannot avoid the broad language of the statute."

He also expressed the opinion that the "Cummins Amendment" forbids value affecting rates for transportation, and which is contrary to the holding of the Commerce Commission. (Tr. pp. 38-9).

Obviously, if an amendment to the Commerce Act has fastened upon the carrier absolute liability, regardless of any conduct of the shipper, even though in violation of other provisions of the Commerce Act, the action of the Trial Judge was correct, and no further defenses were permissible.

The only tariff under which this shipment could have been accepted, prescribed rates varying with the value of the property; and if this tariff was void, because rates were based upon value, the shipper committed no wrong in allowing his horses to be shipped on a nominal value instead of actual value as prescribed in the filed and published tariffs.

Therefore, it becomes necessary to consider the "Cummins Amendment" in the double aspect as to the "liability imposed," and the "denial of rates varying with value."

The Liability Imposed.

Formerly it was usual for carriers to insert a clause in the shipping contract, limiting liability on shipments to loss or damage occurring on their own lines; and on June 29, 1906, Congress passed an Act (Carmack Amendment) prohibiting a carrier limiting by contract its liability to any point short of destination of the shipment, and this Act was sustained in:

Atlantic etc. R. Co. vs. Riverside Mills, 219 U. S. 194.

It was also usual for carriers to insert a provision in the shipping contract limiting the liability of the carrier to a "declared value," or "shipping value," and which bore no relation to the "actual value" of the shipment. In some States this limitation was void because of a constitutional provision, in others because of statutes, and in still others because of decisions of the courts declaring void contracts undertaking to limit the amount of the common law liability of a carrier.

C. M. & St. P. R. Co. vs. Solan, 169 U. S. 133.

This Court had, on the other hand, upheld the validity of "limited liability" contracts.

Hart vs. Pennsylvania R. R. Co., 112 U. S. 331;

C. M. & St. P. R. Co. vs. Solan, 169 U. S. 133.

It thus resulted in a different measure of damages being applied to interstate shipments, depending upon whether the case arose in one of these State courts, or in a Federal court.

The Act of June 29, 1906 (Carmack Amendment) was held in *Adams Express Co. vs. Croninger*, 226 U. S. 491, to destroy the power of States to deal with the question in so far as it applied to interstate shipments; and the Court, in that case, re-affirmed its holding in former cases, allowing the carrier

and shipper to agree upon any value for the shipment, and allowing the carrier to adjust the charge for the carriage to this "agreed" or "declared" value, instead of "actual" value.

Thereupon it became the rule of carriers to insert in their shipping contracts a clause limiting the liability of the carrier to the value "declared" by the shipper and bearing no relation to actual value; and the rate or charge of the carrier was applied to such "declared" value, instead of actual value. This practice resulted in \$15,000.00 worth of automobiles being shipped upon a value of \$50, and the validity of the contract was upheld in:

Pierce vs. Wells-Fargo Ex. Co., 236 U. S. 278 (decided in February, 1915).

The language of the "Carmack Amendment" (34 Stat. 584), omitting unimportant words, is:

"That any common carrier, . . . receiving property for transportation, . . . shall issue a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it . . . and no contract, receipt, rule or regulation shall exempt such common carrier, . . . from the liability hereby imposed."

In *Adams Express Co. vs. Croninger*, 226 U. S. 506, it was contended this language imposed *additional* liability upon the carrier, but the court said:

"The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered;' and plainly implies a liability for some default in its common-law duty as a common carrier."

In *Missouri etc. R. Co. vs. Harriman Bros.*, 227 U. S. 672, the court said:

"The liability imposed by the statute is the liability

imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence."

In this situation, Congress set about to adopt for interstate shipments the rule prevailing in these States; accordingly, in February, 1914, Senator Cummins introduced a bill amending the "Carmack Amendment" to read:

"That any common carrier, . . . receiving property for transportation . . . shall issue a . . . bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it . . . and no contract, receipt, rule or regulation shall exempt such common carrier from the liability hereby imposed;

"and any such common carrier . . . shall be liable to the lawful holder of said receipt or bill of lading for the full actual value of such property notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; *and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void.*

"That if the property so offered and received for transportation is hidden from view by wrapping, boxing, or otherwise, the rule of the common law shall apply thereto in so far as the limitation of the recovery to the value stated in writing by the consignor is concerned, and in such cases a tariff filed with the Interstate Commerce Commission may lawfully prescribe rates varying with values as so stated."

Senate Bill 4522, Report No. 407.

For convenience this bill is separated into three paragraphs: The first is a mere repetition of the "Carmack Amendment;" the second forbids limitation of the amount of the carrier's

liability, in the event of liability; and the last deals with the exceptions to this measure of liability.

On April 16, 1914, the Senate Committee on Interstate Commerce, submitted a report recommending the passage of the bill, with the last paragraph changed to read:

“provided, however, that, *except as to ordinary live stock*, if such property so offered and received for transportation is hidden from view by wrapping, boxing or by other means, or if express authorization has been heretofore granted or shall be hereafter granted by the Interstate Commerce Commission for the establishment and maintenance of rates for the transportation thereof dependent upon the value of the property shipped, as stated in writing by the consignor, and reference given in the rate schedule to such authorization, then the rule of the common law shall apply thereto in so far as the limitation of the recovery to the value stated in writing by the consignor is concerned, and in such cases a tariff filed with the Interstate Commerce Commission may lawfully prescribe rates varying with values as so stated.”

The Senate adopted the Bill, after changing the *proviso* to read:

“*Provided, however, That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods*, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper.”

And in this form the bill became a law.

The report of the Senate Committee says:

“The object of this legislation is to make carriers engaged

in interstate commerce liable for the actual loss, damage, or injury to such property caused by them, *notwithstanding any limitation of liability or of the amount of recovery in any receipt or bill of lading or in any tariff filed with the Interstate Commerce Commission*, save in one of two cases:

And:

"Many States have statutes forbidding such limitations and requiring carriers to respond in the full amount of loss, damage, or injury occasioned by their negligence, and in some States the courts of last resort construed the common law to forbid such limitations."

Comparing the bill as introduced in the Senate, with the report of and the bill recommended by the Committee, and the bill adopted by the Senate, indicates no purpose to impose additional liability upon the carrier, *or to change the common law rule of liability*. The Senate was careful to preserve in the bill the words "caused by it," which had been construed by this Court to mean "common law liability." The sole purpose of the legislation appears to have been to prevent the carrier limiting by contract the *amount* of its common law liability in the event of liability.

It is to be observed the bill as introduced by Senator Cummins, the bill as changed and recommended for passage by the Senate Committee, and the bill as it was adopted in the Senate only differed in the exceptions to the general rule of liability, contained in the *proviso* to each of the three bills.

The bill introduced by Senator Cummins limited the exception to "property . . . hidden from view by wrapping, boxing, or otherwise."

The Committee reported that, "except as to ordinary live stock," if the property "is hidden from view by wrapping, boxing, or other means, or if express authorization has been heretofore granted or shall be hereafter granted by the Interstate Commerce Commission, there may be a "limitation of the recovery to the value stated in writing by the consignor."

The bill adopted by the Senate, narrowed the exception to property "hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods."

Senator Cummins introduced another bill amending this first Cummins Amendment, and which was adopted August 6th, 1916. This second amendment allows limited liability contracts for all property except "ordinary live stock." 39 Stat. 441.

In *Chicago etc. R. Co. vs. McCaull-Dinsmore Co.*, 253 U. S. 97, this court held that any limitation of the amount of common law liability was prohibited, and that the words of the Cummins Amendment indicated a "broad general purpose."

In that case a carrier sought by contract to limit the amount of its liability, in the event of liability, to the value of the shipment at the point of origin, instead of destination—the common law rule; and this was held to violate the Cummins Amendment.

It is to be noted that while the Court in this case refers to the construction of the Cummins Amendment by the Commerce Commission in 33 I. C. Rep. 693, yet upon a subsequent hearing, and before this decision of the Court, the Commission had held that any effort by the carrier to limit the amount of its liability to the value of the property at the point of origin rather than destination, was contrary to the language of the Cummins Amendment and void; and also referred to the fact that in its earlier opinion it "did not give an unqualified affirmative answer to the question categorically stated."

In re: Bills of Lading, 52 I. C. C. Rep. 708.

In re: The Cummins Amendment, 33 I. C. C. Rep. 682, the commission said:

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"It is perfectly plain that the purpose of this law is, except as otherwise provided therein, to invalidate all limitations of carrier's liability for loss, damage, or injury to property transported.

"It is to be remembered that the Cummins Amendment is not a separate statute, but is an amendment to the act. It must, therefore, be construed as a part of, and in connection with other portions of the act, and in such a way as to give effect to the whole statute.

"The Congress did not affirmatively recognize any rates based upon declared value other than those authorized by this proviso. This, of course, does not mean that commodities may not be reasonably classified according to value and be subject to different rates applicable to different grades of the same commodity, which is a different matter from limiting the liability to the declared value.

"It is important to keep in mind that the carriers are not prohibited from making different rates dependent upon the value of different grades of a given commodity; that, except as covered by the Cummins Amendment, including approval of the rates by the Commission, the carrier is subject to all of the liabilities imposed by that amendment; and that if, in any instance, the shipper declares the value to be less than the true value in order to get a lower rate than that to which he would otherwise be entitled, he violates, and is subject to the penalty prescribed in section 10 of the Act."

It is submitted the first Cummins Amendment merely means: "Hereafter it shall not be lawful for a carrier to limit by contract the amount of its common law liability in the event of liability, except where the property transported is hidden from view by boxing, wrapping, or otherwise, and the carrier is not informed of its character."

And that the second Cummins Amendment means: "Hereafter it shall not be lawful for a carrier to limit by contract

the amount of its common law liability for loss or damage to ordinary live stock."

It is a "measure of damage" statute, and not a "liability imposing" statute. It restrains the carrier from attempting to "limit by contract" the amount of its common law liability, in the event of liability. The liability imposed is that found in the "Carmack Amendment," which this Court had construed to be common law liability. As said by the Senate Committee "its purpose" was to "make carriers . . . liable for actual loss, damage or injury . . . notwithstanding any limitation of liability or of the amount of recovery in any receipt or bill of lading or tariff . . . "

So construed, this amendment takes its proper place in the Commerce Act, which has been a growth of legislation and judicial construction since 1887. And thus construed, no other provision of the Commerce Act is destroyed or affected. And "being amendments of the Interstate Commerce Act, they are to be read in connection with it and with other amendments of it."

Texas vs. Eastern Texas R. Co., 258 U. S. 204.

The Cummins Amendment was adopted March 4, 1915, but did not take effect for ninety days. The Commerce Commission accordingly required carriers to revise their tariffs and strike from the shipping contract the clause limiting the liability of the carrier to a "declared value" of the shipment, and required shippers to disclose the "real value" of the shipment, and required the carriers to collect the "real value" rate. *Since the carrier could no longer limit the amount of its liability, in the event of liability, the shipper could no longer have a rate less than actual value rate; and obviously, the real value of the property had to be ascertained so the lawful rate could be charged by the carrier and paid by the shipper.*

The new shipping contract (Trans. p. 22), in the opening

sentence says "the shipper must state the actual value of the shipment," and there is no clause in the contract limiting the liability of the carrier to an amount less than actual value.

For these reasons it is insisted the "Cummins Amendment" does not control, and is not material to a proper decision of this case.

Rebating.

Rebating is a subject not dealt with in the Cummins Amendment. Those States denying a carrier the right to limit by contract the amount of common law liability were not dealing with the question of "equality of rates and service;" and when Congress was enacting legislation to apply this State rule to interstate commerce the question of "equality of rates and service" was not involved or affected; nor can it fairly be said the mere denial of a right to limit common law liability, modified the "great purpose" of the Act requiring "equality of rates and service," or absolved shippers from obeying all the provisions of the Commerce Act.

The original Act of 1887 merely imposed penalties upon and prohibited the carrier giving a rebate, the amending Act of 1889 made shippers knowingly receiving a rebate guilty of fraud, and the amending Act of 1906 made it unlawful for either the shipper to receive, or the carrier to give, "any rebate whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs." Both shipper and carrier were also made guilty of a misdemeanor. (32 Stat. 847.)

Armour Packing Co. vs. U. S., 209 U. S. 69.

The shipper says in this record it requires a practical knowledge of racing and race horses to ascertain their value (Trans. p. 19); and even then, one must know the breeding, disposition, physical condition and performances of the horse

(Trans. p. 20), that one of his horses had "shown up" well in "private" trials, but had never "raced" (Trans. p. 20).

In *Missouri etc. Ry. vs. Harriman*, 227 U. S. 669, this Court says:

"When the carrier graduates its rates by value, and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate."

In trying to ascertain and apply the lawful rate there seems to be no good reason for absolving the shipper from stating value, and imposing the duty solely upon the carrier agent, who does not know and in most instances cannot even ascertain such value. Nor should it be presumed Congress intended to allow the shipper, who knows the value of the shipment, to stand by while the carrier agent, knowingly or unknowingly, inserts a fictitious value in the shipping contract, and yet allow the same shipper, who has received the benefit of a rate based upon this fictitious value, to recover the full value of the shipment, in the event of loss; and which this Court had said, before the adoption of the Cummins Amendment, "would neither be just nor conducive to sound morals or wise policies," but "would open a wide door to frauds and destroy the uniform operation of the published tariff rate sheets."

Kansas City R. Co. vs. Carl, 227 U. S. 639.

Denial of Rates Varying with Values.

As heretofore stated, the Trial Judge expressed the opinion the Cummins Amendment forbids rates varying with value. This belief is rested upon the language of the *proviso* in the Act recognizing the practice of basing rates upon the value "declared" by the shipper, instead of "actual" value.

—No reasonable tariff can be conceived of, and no reasonable

classification can be imagined without considering value as an element; and in this record it appears a "race" horse that cannot "race" when developed, is worth no more than an "ordinary" horse. (Trans. p. 21.) Many race horses are worth a fortune—"Man O'War," "Zev," "In Memoriam," "Papyrus" and others. In the case at bar the shipper values one of his horses at \$25,000, and another at \$2,000, and both are in the same shipment. (Trans. p. 20.) A "flat" rate for all race horses would compel the carrier to charge and the shipper to pay the same rate for a horse worth \$500 and one worth \$500,000.

The Commerce Commission, after a full hearing and consideration, said:

"The right of the carrier to initiate its rates and to consider value of the property tendered for transportation as an element in determining the classification thereof or the rate applicable thereto has not been denied by the act or withdrawn by this amendment."

In re Cummins Amendment, 33 I. C. C. Rep. 682.

Moreover, the Trial Judge's holding is rested upon a construction of a *proviso* to an Act regulating the kind of a contract a carrier may make with a shipper; and assumes Congress has departed from a practice as old as rate making itself in a *proviso* to an Act not even dealing with the subject of rate making.

The language of the *proviso* merely recognizes what the courts and the Commerce Commission had approved in all tariffs—allowing the shipper to declare a "shipping value," instead of "actual value," and allowing the carrier to adjust its charge and liability to this "declared value," instead of to the "actual value" of the shipment.

The Shipping Contract.

When the shipper attempted to state negotiations preceded the making of the "shipping contract" required by the "Car-

mack Amendment," repeated in the "Cummins Amendment," and made a part of the filed and published tariffs, objection was made, but the Trial Judge allowed the shipper to proceed. (Trans. pp. 18 and 19.)

When the shipper offered evidence of the value of the shipment, and contrary to that stated in the "shipping contract," objection was made that this contract could not be varied by parol evidence, but the court allowed the shipper to proceed with this evidence (Trans. p. 20); and on a later day, during the trial refused to exclude it (Trans. p. 36).

With all due respect, this ruling, if sound, destroys the effect of the provision in the "Carmack Amendment," repeated in the "Cummins Amendment," and required by the Commerce Commission, compelling the carrier to make a written contract for each shipment, and concerning which this court has said the carrier may not be held "to a different responsibility from that fixed by the agreement made under the published tariffs and regulations."

Georgia R. Co. vs. Blish Milling Co., 241 U. S. 197.

If the shipping contract, when made, is not to govern the rights of the parties to it, but may be varied or changed by parol evidence, it can serve no useful public purpose, since to change it destroys uniformity of rates and service.

On the subject of allowing evidence to vary the terms of the "shipping contract" and to prove a higher value than that stated, the Court had said, before the adoption of the Cummins Amendment:

"The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied must be conclusive in an action to recover for loss or damage a greater sum . . . To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess

of the maximum valuation thus fixed, would both encourage and reward undervaluations, and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies . . . It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets."

Kansas City R. Co. vs. Carl, 227 U. S. 639;

American Ry. Express Co. vs. Lindenburg, 260 U. S. 592.

"The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and the uniform application."

Chicago etc. Ry. vs. Kirby, 225 U. S. 166.

The Court said in the last cited case, that any agreement not allowed by the filed tariffs is void and unenforceable; and therefore the "shipping contract" may not be varied by parol evidence, since this would result in destroying the required uniformity of the Commerce Act and make valid and enforceable that which the Court has said is void and unenforceable.

If this view of the law be sound, the shipper in this case may recover from the carrier the value of the property stated in the "shipping contract;" since this ruling would exclude all evidence of a different value of the property lost; and at the same time would not require the shipper to disclose his illegal conduct in stating his case.

The Effect of a Rebate.

The Circuit Court of Appeals in disposing of this case said:

"It remains to consider whether the mere giving and receiving of rebate from the applicable tariff rate renders the contract of shipment here in question void and unenforceable. . . .

"The evidence of the value of the horses was not incompetent because different from that stated in the written shipping contract. The Cummins Amendment imposed liability for full value 'notwithstanding any . . . agreement as to value . . . in any contract'." . . .

Trans. pp. 50-53.

It is to be observed the Court of Appeals agrees with the Trial Judge in holding the Cummins Amendment authorizes the shipping contract to be varied by parol evidence, although such contract is specifically required to be made by the Cummins Amendment; in other respects the decision of the Court of Appeals is rested upon different grounds.

It may be conceded for the argument that "the mere giving and receiving of rebate from the applicable tariff rate . . . does not render . . . the contract of shipment here in question void and unenforceable;" and if the shipper in this case was merely asking the enforcement of the shipping contract as made, the fact that a rebate had been given and received might be conceded for the argument not to defeat a recovery on the shipping contract. But, with all due respect, that is not the case made on this record.

Obviously two questions were involved in this case. The first, whether the carrier was guilty of negligence creating liability for damage; and the other, conceding the carrier's liability, the amount of damage. The first question has been determined against the carrier, and the case turns upon the amount of damage.

In this case the shipper is not seeking to enforce the shipping contract as made, and upon which this suit is necessarily grounded, but says he is not bound by the shipping contract, which states the value of the shipment and upon which the rate was adjusted—all in conformity with the filed and published tariffs,—but insists he may prove *aliunde* the contract a vastly different value, and for the purpose of increasing the amount of damage. But in thus varying the terms of

the shipping contract, he necessarily discloses to the court his "unlawful" conduct, which he asks the court to ignore and give him a recovery for the larger amount.

The purpose of Congress in prohibiting rebating and unjust preferences, in whatever form attempted, or device resorted to, is based "upon grounds of public policy, and for the protection of third parties."

L. & N. R. R. Co. vs. Mottley, 219 U. S. 467.

"The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service, under the same conditions, should be the one established published, and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

Armour Packing Co. vs. U. S., 209 U. S. 72.

It is submitted the many amendments of the Commerce Act prohibiting rebating and unjust discriminations in interstate shipments indicate no purpose to make the prescribed penalties exclusive, or to allow shipper or carrier to ignore the unlawful conduct, or set it up as the foundation of legal rights.

In *Armour Packing Co., vs. U. S.*, 209 U. S., 79, the court traces the various amendments to the original Commerce Act of February 4, 1887 (24 Stat. 379), to the time of that decision in 1908. There it is pointed out how Congress, starting with prohibitions and penalties against carriers alone, has steadily amended the Act so as to extend these prohibitions and penalties to carriers and shippers alike, so that whether the inequality to one shipper as against other shippers flows from the act of a carrier or a shipper, or both, it was the thing the Commerce Act intended to prevent, and neither shipper nor carrier may set it up as the foundation of a legal right.

Turning to the decisions of this Court, it is manifest no different treatment has been accorded shippers from that accorded carriers in maintaining what this Court has said "the great purpose of the Act to regulate commerce, while seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, . . . and forbidding rebates, preferences, and all other forms of undue discriminations."

N. Y. etc. R. Co. vs. I. C. C. 200 U. S. 391.

In furtherance of this policy the court held a contract between a shipper and a carrier void and unenforceable simply because the service contracted for was not prescribed in the filed tariffs, which, if allowed, would open the door for inequality and favoritism between shippers. The court said:

"The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and the uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train was to give an advantage or preference not open to all, and not provided for in the published tariffs."

Chicago & A. R. Co. vs. Kirby, 225 U. S., 155.

Where limited liability contracts are permissible, many cases have come to this Court in which shippers after receiving the benefit of the lower rate applicable to the lower value stated in the shipping contract, have sought to recover a higher value when the shipment was lost or damaged in transit. But the Court has uniformly held the shipper could not ship on one value, to which the applicable tariff rate was applied, and then, in the event of loss or damage, recover on a higher value. The reason is thus stated in *Kansas City etc. R. Co. vs. Carl*, 227 U. S., 639:

“To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations, and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies.”

Quoted with approval in *American Ry. etc. vs. Lindenburg*, 260 U. S. 592.

In *Missouri etc. v. Harriman Bros.*, 227 U. S. 671, the court says:

“If he (shipper) knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the 1st section of the Elkins Act of Feb. 19, 1903 (32 Stat. at L. 847).”

In *Great Northern R. Co. vs. O'Connor*, 232 U.S. 515, the court says:

“If, on the other hand, there are alternative rates based on value, and the shipper names a value to secure a lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that class.”

In *Atchison R. Co. vs. Robinson*, 233 U. S. 180, the court, after citing other cases, says:

“We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates, and that so long as they remain operative they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing.”

In the last three cases the Court enforced the shipping contract for the limited amount stated in the contract and to

which the transportation rate was applied. It is not possible to believe the Court meant to say it would have enforced the contract for the full value of the shipment, if it had appeared the shipper had violated the law, and had been guilty of rebating. Obviously, the Court meant the contract could not, in that event be enforced for any amount. If a shipper acting "lawfully" can have a recovery for only a limited value, a shipper acting "unlawfully" cannot be rewarded with a recovery for a much larger value.

In *Illinois C. R. Co. vs. Messina*, 240 U. S. 394, a passenger violating the Commerce Act in riding free, but by permission, on an interstate journey, was denied an action for personal injuries received. The members of the Court differed as to whether the free-pass section of the Commerce Act was applicable, but not as to the effect of the Act. In that case, as in this, the foundation of the action was necessarily grounded upon the "unlawful conduct" of the plaintiff, who invoked the aid of the Court to secure rights directly flowing from this unlawful conduct, and which had to be disclosed and relied upon in stating the cause of action.

One section of the Commerce Act makes it "unlawful" to ride free on an interstate journey, another section makes it "unlawful" for a shipper to accept a rebate whereby property shall be transported at less than tariff rates. The shipper and the passenger are each made guilty of a misdemeanor. The transportation of persons or property under such circumstances is made illegal.

In *New York Central etc. R. Co. vs. U. S.*, 212 U. S. 505, it was insisted that since the transportation was at the lawful rate before the Elkins Act was adopted, and a part of the lawful rate was not refunded until after the adoption of the act, the statute did not apply, and the court said:

"Manifestly the act does not refer alone to the transportation of the property, although that is an essential element

of the offense, but the thing aimed at is the giving or receiving of a rebate whereby the property shall be transported at less than the rates named in the published tariffs.

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“The word *shall* refers to the happening of the event,—the giving of the illegal rebate,—and was not introduced into the statute for the purpose of making future transportation illegal. No new legislation was required to make transportation under such an agreement illegal.”

Assuming, therefore, the contract for the transportation of the shipper's horses, under the circumstances shown on this record, was “unlawful,” the general rule of law with reference to the non-enforcement of illegal contracts would also seem to deny relief to the shipper.

“The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.”

McMullen vs. Hoffman, 174 U. S. 654.

The Court of Appeals was of opinion the shipper could recover notwithstanding his “unlawful” conduct in securing a rate on one value and then asking a judgment for a much higher value; although this Court has said such a result would be neither “just nor conducive to sound morals or wise policies;” and the Court of Appeals also expressed the opinion the penalties prescribed in the Commerce Act were exclusive, and that the Congress did not intend to render the shipping contract illegal and unenforceable, although to enforce the contract as the shipper insists in this case, necessarily brings about the very preference forbidden by law. The Court of Appeals also said:

"This rule is not in conflict with, but is an exception to the general rule that an action cannot be maintained upon an illegal contract."

(Trans. p. 51.)

The recognized so-called exceptions to the non-enforceability of an illegal contract have not heretofore been allowed to bring about a result of this kind. It is only where the illegality is merely collateral to the contract sued upon that courts have enforced the contract; and the cases cited by the Court of Appeals, it is respectfully submitted, are of this character; and one of them thus states the rule: The purchaser of sewer pipe sought to avoid payment because the seller had entered into an illegal agreement with other makers of pipe, and the court said:

"So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such an arrangement."

Connolly vs. Union Sewer Pipe Co., 184 U. S. 551.

The distinction between the enforcement of an illegal contract and the enforcement of a contract merely collateral to the illegal contract is emphasized in *Continental Wall Paper Co. vs. Voight*, 212 U. S. 260.

In the case at bar the shipping contract (Trans. p. 22), required by the Carmack and the Cummins Amendments, and its terms prescribed by the Commerce Commission and made a part of the filed tariffs, not only requires the shipper to disclose the actual value of the shipment, but it also states the rate, to-wit: one per cent of value above the minimum value of the shipment. So it is clear the transportation and the rate are so interwoven as to make the transportation illegal

when the rate is departed from. Here the shipper claims the right to rely upon the contract for the transportation, and then the right to introduce evidence *aliunde* the contract to contradict its terms, which evidence discloses its illegality—the acceptance of a rebate—and then claims the right to a judgment for a much higher value than that stated in the shipping contract, and to which the lawful rate was applied.

A different situation was presented in *Merchants etc. vs. Insurance Co.*, 151 U. S. 387, where it was defensively asserted the carrier agent had allowed a rebate from the applicable tariff. The matters in controversy in that case arose in 1887, and while rebating by carrier alone was forbidden. It does not appear that the rate depended upon value, or any act of the shipper; no “shipping contract” was at that time required, nor was there any effort to vary or contradict the “contract of affreightment.”

Here the shipper is not asking the enforcement of the shipping contract as made, but seeks to vary its terms, and, as varied by evidence *aliunde*, asks the Court to enforce it, though to do so brings about the preferences forbidden by the law, which is a different action from one merely seeking an enforcement of the “shipping contract” as made, and involves more than “the mere giving and receiving of rebate from the applicable tariff rate.”

Public Policy.

In its last analysis this case seems to present for consideration and determination this question of public policy: A shipper of twenty years' experience in racing and shipping horses to and on most of the tracks in this country, as well as Canada and Mexico, in plain violation of the filed and published tariffs, with the aid and assistance of a carrier agent, has his horses shipped by express on a minimum value of \$500 and rate of \$82.50, when he should have stated a value of at least \$51,500, and have paid at least \$592.50; this experienced

shipper comes into court, when his horses are lost in transit, and disclosing these facts to the Court, asks to be rewarded with a judgment for the full value of his horses.

To sanction a recovery in such a case, obviously means the shipper is not to be regarded as having much concern in maintaining the "equality of rates and service" which this court has said was, aside from reasonable rates, the "great purpose" of the Commerce Act.

It has been seen Congress began by making rules and penalties for the carriers alone, but gradually extended those rules and penalties to shippers as well. And it has also been seen the decisions of this Court have not favored shippers who have failed to observe the requirements of this law. And if the penalties of the Commerce Act are held to be exclusive for the misconduct of the shipper, the punishment, even if inflicted, is mitigated by the reward of a large civil judgment.

Obviously there will always be a percentage of property lost or damaged while being transported in interstate commerce; and if shippers are assured the only risk they take in rebating and other violations of the Commerce Law is the slight chance of a criminal conviction, and that their civil rights are unaffected, it will obviously be the more difficult to maintain "equality of rates and service." And in determining the question it must be remembered the "great purpose" of the Commerce Act, aside from reasonable rates, was to prevent inequality of rates and service between shippers. That purpose was and is to protect shippers from shippers, and not carrier from shipper, or shipper from carrier.

Declining civil relief to shippers violating the "great purpose" of the Commerce law and necessarily disclosing the fact in stating their cause of action, would seem to be more successful than rewarding them with a civil judgment, and relying alone upon the uncertain remedy of criminal convic-

tion, in maintaining equality of rates and service, and also harmonizes with this rule of law:

"A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment."

Ritter vs. Mutual Life Ins. Co., 169 U. S. 154.

While the Second Cummins Amendment broadened the field of limited liability contracts, and, therefore, the opportunity to resort to the particular "device" used in this case to secure a rebate, is lessened, yet there are many other "devices" which can be resorted to by shippers to destroy equality of rates and service, and therefore the question of how best to enforce this public policy is still of importance, and involves far reaching consequences.

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1923

No. 226

ADAMS EXPRESS COMPANY,
Plaintiff in Error
vs.

W. W. DARDEN,
Defendant in Error

**BRIEF AND ARGUMENT FOR DEFENDANT IN
ERROR, W. W. DARDEN.**

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IN THE
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No. 226

ADAMS EXPRESS COMPANY,
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vs.

W. W. DARDEN,
Defendant in Error

**BRIEF AND ARGUMENT FOR DEFENDANT IN
ERROR, W. W. DARDEN.**

STATEMENT OF THE CASE.

May It Please Your Honors:

This case is now before your Honors upon final hearing on Writ of Error to the Circuit Court of Appeals for the Sixth Circuit—the opinion of that Court in this case being reported in 286 Fed., 61-68, and also contained in the printed transcript at pages 48-53.

The Case in Outline and Its Present Status in This Court.

Defendant in Error, W. W. Darden, who was plaintiff in the District Court below (and is hereinafter referred to by name or as plaintiff), brought this suit in the year 1915 against Plaintiff in Error, Adams Express Company (hereinafter referred to as the Express Company or as defendant), to recover \$65,000 damages, representing the value of five thoroughbred horses belong-

ing to said Darden, and alleged to have been negligently killed on the night of July 7, 1915, in a railroad wreck occurring about twelve or fourteen miles northeast of Cincinnati, Ohio, while said horses were being transported by said Express Company from Latonia, Kentucky, to Windsor, Ontario, in the Dominion of Canada.

The *gravamen* of plaintiff's suit was the alleged *negligence* of the Express Company and its Railroad Company agent in making the shipment of the horses in question in a wholly unfit car, which broke or pulled apart and caused the wreck in which plaintiff's horses were killed.

The original declaration of plaintiff Darden was filed against the Express Company and the Pennsylvania Railroad Company (Trans., pp. 1-5); and later, by amendment, the suit was extended so as to include the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company; and an amended declaration in the District Court below was filed against said Express Company and these two Railroad Companies. (Trans., pp. 6-11.)

Later,—it not being clear that either of said Railroad Companies had any agent residing in the Federal District in which the suit had been brought upon whom process could be served, and because the Express Company, in any event, was responsible for the negligent action of the Railroad Company, which was transporting the horses in question as the agent of said Express Company, at the time and place of the wreck and accident in question—the case in the District Court below was non-suited as to the two defendant Railroad Companies. (Trans., p. 12.)

The case was first tried below in the year 1916, before the Hon. Edward T. Sanford, then District Judge, and a jury, and resulted in a verdict for plaintiff and against the Express Company, which was set aside by the District Judge for reasons stated in a memorandum opinion filed by him. (Trans., pp. 12, 13.)

Thereafter, in November, 1921, another trial occurred before the same District Judge and a jury, and again resulted in a verdict in favor of said Darden and against the Express Company for \$32,500. (Trans., p. 14.)

During the progress of this last trial in the District Court below the District Judge had occasion to overrule certain technical motions made by the Express Company to exclude all of plaintiff's evidence relating to the value of the horses which were killed, and put in the alternative, to direct a verdict for defendant; and the opinions of the District Judge in making these rulings are contained in the record. (Trans., pp. 38, 39, 40.)

The Express Company duly made its motion for a new trial in the District Court below, which motion was limited to the alleged errors of the trial judge in overruling the Express Company's motions during the trial, and which motion was overruled (Trans., pp. 15, 40-42); and thereupon the Express Company sued out a Writ of Error removing the case to the United States Circuit Court of Appeals for the Sixth Circuit (Trans., pp. 45, 46); and said Court of Appeals, on January 9, 1923, speaking through Circuit Judge Knappen, handed down its learned opinion, affirming in all respects the holding and judgment of the District Court below (Trans., pp. 48-53; 286 Fed., 61-68.)

And in the instant proceeding in error in this Court, the Express Company has assigned errors and seeks a review and reversal of said holding and judgment of the Circuit Court of Appeals.

The Express Company also, at a former term, filed in this Court a Petition for *Certiorari*, which was fully responded to in an Answer and Brief by said Darden, and action thereon was postponed by your Honors to the hearing on the Writ of Error.

Said Darden, at a former term, made Motions to Dismiss or Affirm in this Court, supported by a Brief and Argument, to which the Express Company filed a Brief in reply; and your Honors postponed action upon said motions to the hearing in this Court on the merits.

The Express Company now, on this final hearing, has filed its Assignment of Errors and a supporting Brief; and we shall now respond thereto at some little length, although this will involve a mere repetition in large part of what we have heretofore said in our Answer and supporting Brief to the Express Company's Petition for *Certiorari*, and in our previous Brief supporting our Motions to Dismiss or Affirm.

In our Briefs filed in behalf of said Darden at the former term we fully presented our insistence that the Writ of Error should be dismissed because not permissible procedure in this case; and that while Certiorari was the only permissible remedy, the petition for Certiorari should be dismissed for lack of merit.

See our "Motions to Dismiss or Affirm and Supporting Brief and Argument," etc., pp. 27-34; also Our "Answer and Brief," etc., in opposition to Petition for Certiorari, p. 32.

The Nature of the Questions Now Presented on the Merits in This Court.

All the questions which the Express Company seeks to present in this Court are, we respectfully submit, without any sort of *substance* or *merit*, and are fully answered against the contentions of the Express Company by the *express* and *explicit terms* and *provisions* of the Act of Congress of March 4, 1915, known as the "Cummins Amendment" to the Act to Regulate Commerce.

By the terms of said Cummins Amendment it is expressly provided that any common carrier or transportation company "receiving property for transportation" from a point in the United States to a point in an adjacent foreign country, shall issue a receipt or bill of lading therefor, and shall be *liable* to the lawful holder thereof, or to any party entitled to recover thereon, "whether such receipt or bill of lading has been issued or not"—"for the *full* actual loss, damage or injury to such property *caused by it*" or by any carrier to which such property may be delivered.

And said Cummins Amendment, in so many words, declares that this *liability* of any such transportation company for such *full actual loss*, shall exist—

"and **no contract, receipt, rule, regulation or other limitation of any character whatsoever* shall exempt such common carrier, railroad or transportation company from the *liability hereby imposed*;"

And said Act of Congress in so many words provides that such transportation company shall be so liable "for the full actual loss, damage or injury to such property"—

*Italics throughout this Brief are ours.

"notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading or in any contract, rule, regulation or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void: (Post, p. 71.)

For the convenience of your Honors we reprint as Appendix "A" to this Brief the Cummins Amendment of March 4, 1915, in full.

Post, pp. 70-72.

That the valuable race horses of said Darden were killed as the result of the *negligence* of the Express Company and its Railroad Company agent, and that the damages which he thereby sustained were "caused by it" (the Express Company), is *not now denied at all.*

That the Express Company "received for transportation" these race horses, to be carried from Latonia, Ky., to Windsor, Ontario, is *not denied*, and was indeed finally stipulated in the District Court below. (Trans., p. 35.)

That said Darden fully informed the agent of the Express Company of the great value of his race horses, before said company received same for transportation, is *not denied*; and as we shall later see the Express Company, upon the direct question being asked by the District Judge below, expressly admitted that it did not claim that said Darden was guilty of "any deception" at all. (Trans., p. 39.)

After the verdict and judgment in the Court below it was not insisted in that Court nor in the Court of Appeals, nor is it now insisted in this Court, that the recovery of said Darden of \$32,500 is to any degree excessive, or represents anything more than mere compensatory damages; and indeed said recovery was a conservative and inadequate one.

It is not insisted that any error was made by the learned District Judge in his charge to the jury, and indeed no exceptions were taken to the charge, and the same is not even contained in the Bill of Exceptions.

This Court has heretofore construed said Cummins Amendment of March 4, 1915, and has held that there is no ambiguity, latent or otherwise, in its terms and provisions; and that no argument based upon the "history" of this statute, or upon the "policy" of the later Act of August 9, 1916, can prevail against the plain "meaning of the words" of said statute and the broad "general purpose" indicated by its words.

Chicago, etc., Ry. Co. v. McCaul-Dinsmore Co., 253 U. S., 97, 99, 100.

Such being *this case* the learned District Judge naturally felt constrained to administer against the Express Company the plain provisions of this statute; and in taking the action now complained of by the Express Company the District Judge said that he could not "avoid the broad language of the statute." (Trans., pp. 38, 39.)

The Court of Appeals of the Sixth Circuit naturally reached the same conclusion, which is expressed in its learned opinion in the record (Trans., pp. 48-53), and reported in 286 Fed., 61-68.

Said Cummins Amendment of March 4, 1915, by its terms, became operative *ninety days* after its passage, and so, admittedly, had been in force for more than *thirty days* at the time of the railroad wreck in which the race horses of said Darden were negligently killed.

The "later Act of August 9, 1916, c. 309, 39 Stat., 441" referred to by this Court in the 253 U. S. Case above cited, was not passed until more than a year after the negligent killing of the race horses in question, which admittedly occurred on July 7, 1915; and so said later Act was rightfully held by the Court of Appeals to have nothing to do with this case. (Trans., p. 50.)

In the face of all the above, and because of plain and explicit provisions of the Cummins Amendment of March 4, 1915, it would to no degree interfere with Mr. Darden's right of recovery if he and the Express Company had entered into a formal written contract reciting that his horses were worth only \$100 each, and were being shipped on a rate that was based upon that

understood and agreed valuation—because said Cummins Amendment of March 4, 1915, expressly declares liability for full, actual loss, damage or injury, notwithstanding any such contract or any representation as to value.

Nor would it matter if there had been a tariff on file with the Interstate Commerce Commission fixing the rate at which Mr. Darden shipped these horses, provided they were worth only \$100 each, but fixing a higher rate if the horses had been of greater value—because said Act of Congress expressly declares liability for the full, actual loss, *notwithstanding* the provisions of any tariff on file with the Interstate Commerce Commission; and said Cummins Amendment further provides, as we have seen, that “no contract, receipt, rule, regulation or other limitations of any character whatever, shall exempt such common carrier. . . . or transportation company, from the liability hereby imposed”; and said Cummins Amendment further provides, as we have seen, that “any such limitation” (of liability or amount of recovery) “without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void.”

It appeared in this case that the Express Company “received for transportation” these race horses from Mr. Darden, to be carried from Latonia, Ky., to Windsor, Ontario, without giving to Mr. Darden or any agent of his any receipt or bill of lading therefor, or without having him, or any agent purporting to represent him, sign any paper at all (Trans., pp. 16, 19; 21, 22; 33-35),—but this is immaterial to the full liability of the Express Company enacted by the Cummins Amendment, because said Act of Congress declares such full liability to the party who would be entitled to recover upon the receipt or bill of lading (which the Act provides shall be given to the shipper)—“whether such receipt or bill of lading has been issued or not.” (Post, p. 71.)

The liability for full actual loss to the shipper declared by the Cummins Amendment is against any transportation company “receiving property for transportation”; and it was finally stipulated in the District Court below that the Express Company actually received these race horses for transportation from Latonia, Ky., to Windsor, in Canada. (Trans., p. 35.)

It is true that at the *first* trial of this case in the District Court below, the Express Company produced and had marked as "Defendant's Exhibit No. 2", what *purported* to be a shipping contract, which recited that the Express Company had received "13 running horses," of the value of \$100 each, from Mr. Darden, the shipper, for transportation from Latonia, Ky., to Windsor, Ont., Canada; and this purported contract recited that the rate "depended upon the actual value" of said animals, such *value* to be *stated* by the *shipper*; and it appears, from said pretended contract, that when the value of the shipment exceeded the value stated, a much higher rate than that paid by Mr. Darden would apply. The original of this alleged shipping contract accompanies the record by special order of the District Judge and the Circuit Court of Appeals below (Trans., pp. 27, 58); and this alleged shipping contract also appears in full in the printed transcript. (Trans., pp. 22-27.)

Although by the plain and explicit terms of the Cummins Amendment of March 4, 1915, it would be utterly immaterial to the liability of the Express Company for the full actual loss to the shipper in this case if Mr. Darden had knowingly and deliberately signed this contract which purported to place the value of \$100 each on his horses, and recited that the rate charged was based upon this low value—nevertheless, it is fair to Mr. Darden for your Honors to understand that it appeared *without controversy* that Mr. Darden never signed any such shipping paper or contract reciting that his horses were only worth \$100 each. (Trans., pp. 16; 18-20, 21, 22.)

That this alleged "contract" was nothing but the *crooked device* and *fraudulent thing* of the Express Company's agent (one Fenrock) who never testified at the last trial below at all, and that neither Mr. Darden nor anyone representing him or purporting to act for him knew anything about said alleged contract at all until same was presented by defendant at the *first trial* of this case in the District Court below and was then marked as "Defendant's Exhibit No. 2,"—are things not denied, but on the other hand are admitted and conceded. (Trans., pp. 16-22; 42.)

When the plaintiff below (Darden) at the last trial was proceeding to prove the actual value of his horses negligently de-

stroyed, the Express Company objected on the ground that the "Contract of Shipment" governed, and the Court overruled the objection (Trans., p. 20). When the witness Louden, a colored man who was Mr. Darden's attendant in charge of these horses at the time of the wreck, was testifying, the pretended shipping contract (which had first been introduced as Defendant's Exhibit No. 2 on a former trial and had thus come to Darden's knowledge and access) was merely shown to the witness for the purpose of having him *deny* that he, as Mr. Darden's agent, ever saw said contract or assented to it, or ever made any representation that the horses therein stated to be worth only \$100 each, were worth only that sum. (Trans., p. 22.)

The witness Seamster who testified for plaintiff below, and whose name as "owner or duly authorized agent of the owner" appears signed to said pretended contract (Trans., p. 25) proved without contradiction that he never pretended to act, nor was he understood as acting, for Mr. Darden in any way connected with the writing up of said "contract," and that the Express Company's agent (Fenfrock) understood that he (Seamster) was not acting for Mr. Darden and had nothing to do with Mr. Darden's horses, or the end of the car in which they were shipped; and that he (Seamster) did not "undertake to exercise any rights or make any representations or do anything with reference to the end of the car that Mr. Darden occupied"; and that he never made any representation, in said contract or otherwise, that Darden's horses, or any of the horses shipped in said car, were worth only \$100 each. (Trans., pp. 33, 34.)

And Mr. Darden (without contradiction by anyone) proved that he made no representation as to the value of his horses; never knew of but *the one* express rate or charge he was asked to pay; never assented to said contract or the statements therein; never authorized anyone else to do so for him; never knew anything about any shipping paper or contract at all; and it appeared without contradiction that neither Mr. Darden nor anybody acting for him, or purporting to act for him, ever had any copy of this contract turned over to them, or knew anything about its purported contents, until same was introduced in the first trial of this case in the District Court below (Trans., pp. 16-21, 22; 33-35.)

As stated, the Express Company's agent (one Fenfrock) never testified at all at the last trial below, and his failure to testify was not explained in any sort of way; and the testimony of Mr. Darden and his witnesses to the effect that the alleged shipping contract was nothing but a fraudulent and crooked device of defendant, went unchallenged and is not denied.

On the other hand, as before stated, it was expressly admitted by defendant's counsel in the court below that Mr. Darden was not guilty of any deception whatsoever. To show this, we quote the following from the transcript of the record in the District Court below:

"Before the Court ruled on the defendant's motion for a directed verdict at the conclusion of all the evidence, the Court stated: 'I understand it is not insisted that there was any actual fraud or misrepresentation.' To which defendant's counsel replied: 'If your Honor please, no, not involving moral turpitude. *We don't claim there was any deception*.'" (Trans., p. 39.)

It appeared without contradiction, as before stated, that the Express Company's agent (Fenfrock) was acquainted with Mr. Darden's race horses involved in the shipment in question, knew they were valuable race horses, was informed that they were *very valuable* race horses, and consequently knew when he wrote (without Darden's knowledge) the \$100 valuation in the pretended contract (which neither Darden nor any agent of him ever saw until the first trial below) that this was a mere fraudulent device upon the part of said Express Company's agent. (Trans., pp. 17, 18, 19, 20, 22.)

At an early stage of its opinion in this case the Circuit Court of Appeals reviews most of the undisputed facts of the case relating to the manner of the receipt of these horses for transportation by the Express Company, and their loading and shipment in an unfit car by said Company, in the *absence* of Mr. Darden, and after he had returned to his home in Nashville, Tennessee. (Trans., pp. 48, 49.)

Plaintiff below (Darden) undertook to prove, and did prove without contradiction, his oral conversations and understandings in regard to the shipment of his horses with the Express

Company's agent, one Fenrock (Trans., pp. 16-21). Plaintiff did this merely for the purpose of showing by facts and circumstances that the Express Company "received for transportation" his race horses to be carried from a point in the United States to a point in an adjacent foreign country (as contemplated by the Cummins Amendment of March 4, 1915.) This fact was afterwards and finally stipulated to be true. (Trans., p. 35.)

So the Express Company is now in this Court *admitting* the "receipt for transportation" (as defined in the Cummins Amendment) of plaintiff Darden's valuable race horses; *admitting* that these horses were *negligently* destroyed by it and its railroad company agent; *admitting* the existence of the Cummins Amendment of March 4, 1915, in unmodified form, at the time it received this shipment and negligently destroyed these horses; and is making no question upon the justice of the size of the recovery, and presenting no question against the accuracy of the charge of the trial Judge, which was not excepted to by either party and for that reason is not included in the bill of exceptions. (Trans., p. 40.)

We respectfully submit, in the light of the above showing, that if Writ of Error be proper appellate procedure in this case, such writ was sued out by the Express Company for *delay* only, and it presents no question that is not *frivolous* and *unsubstantial* to the last degree, and that our Motion to Affirm should be granted—(see Rule 6, Par. 4, of this Court); and if Certiorari be the proper reviewing procedure, the petition for that writ should be denied; and in *any event* the case presented is one for an affirmance upon the merits.

We admit we do not understand the Brief of our learned adversaries,—though this is no doubt our fault. It seems to us that this case is briefed and presented to your Honors by plaintiff in error as though the Cummins Amendment of March 4, 1915, had never been passed,—for our learned adversaries never *descend* to any detailed or pointed *notice* or *discussion* of the *plain provisions* of this Act of Congress as applied to the now admitted facts of this case, while at the same time they are making, and can make, no attack upon the constitutional validity of said statute.

We really feel that what we have already stated above, when considered in connection with the opinions of the District Judge and Circuit Court of Appeals in this case,—would be sufficient, without more, to demonstrate the *utter* lack of any merit in any of the assignments of error now urged by the Express Company in this Court; and we have the conviction that your Honors will probably conclude that this reply brief ought to have been closed at this point and without any further effort at elaboration at all.

This case is of such importance to our client, however, that we feel under the duty to proceed now, at some length and with greater detail, to show your Honors the lack of any sort of merit in any of the insistences which the Express Company is now seeking to make.

We will accordingly first proceed, for the convenience of the Court, to make a synopsis of what the limited bill of exceptions in this case shows in regard to the *undisputed evidence* introduced in the District Court below touching the application of the Cummins Amendment of March 4, 1915, to the facts in this case, which will constitute the *entire showing* made by said bill of exceptions.

The Limited and Restricted Bill of Exceptions.

The bill of exceptions reserved by the Express Company in the District Court below is a very limited and restricted one. In addition to incorporating and presenting certain certified copies of tariffs and express classifications on file with the Interstate Commerce Commission at the time of the receipt of this shipment of horses, the bill of exceptions only undertakes to present the evidence given by the plaintiff Darden and his witnesses in the Court below, with respect to certain conversations which occurred between said Darden and one Fenrock, the agent of the Express Company, in regard to the *reception* by the Express Company of the horses for *transportation* from Latonia, Kentucky, to Windsor, Canada; to the payment of the transportation charge by said Darden to said agent of the Express Company; and in regard to the *false and fraudulent filling out*, by the Express Company's agent, of a paper referred to in the record as the "Contract of Shipment" or the "Adams

Express Company Non-negotiable Live Stock Contract" purporting to have been signed by the said Darden or his duly authorized agent, but not actually so signed, and indeed never seen by him until produced by defendant at the first trial below.

The original of this alleged "Contract of Shipment," by the special order of the District Judge, accompanies the transcript of the record in this case. This alleged contract had been marked "Defendant's Exhibit No. 2" on a former trial, and was marked Plaintiff's Exhibit No. 2" on the last trial below, and said alleged "Contract of Shipment" also appears copied in the printed record. (Trans., pp. 22-28.)

It is proper to state that Mr. Fenrock, the agent of the Express Company, did not testify at the last trial of this case in the District Court below, nor is his failure to testify explained at all; and the testimony of the plaintiff below, Mr. Darden, and his witnesses, in regard to his conversations with this agent of the Express Company, Mr. Fenrock, the receipt by the latter of the Express Company's charge for the transportation of the shipment, and the false and fraudulent filling out of this so-called "Contract of Shipment" by said agent of the Express Company, without the knowledge or consent of said Darden or any one authorized to represent him, or purporting to act for him,—is all uncontradicted and constitutes all of the evidence on these subjects.

Darden, Trans., pp. 16-21.

Louden, Trans., pp. 21-33.

Seamster, Trans., pp. 31-44.

From the above cited testimony of the plaintiff below and his witnesses it was made to appear, without contradiction or dispute, as follows:

(1) About ten days before July 7, 1915, plaintiff Darden spoke to Fenrock, the agent of the Express Company, about wanting a two-door steel car in which to ship his horses from Latonia, Kentucky, to Windsor, Canada, and at this time said agent agreed to furnish such a car on July 6th; and at that time told Darden that the rate was \$165.00 for such a car. (Trans., p. 17.) Darden knew this agent of the Express Company, who came out to the race track at Latonia and around the

stables, and there solicited express business for his company. (Trans., p. 17.)

(2) Said agent of the Express Company (Fenrock) *knew* the horses which Darden desired to express and *knew* they were very *high-class* race horses and had won a lot of money and attracted the attention of the people at the race track at Latonia; and Darden told this agent of the Express Company that his horses were entered in several stake races in Canada, and he wanted to get them there in time to have them "freshened up" for these races; and then told said agent that these horses were *very valuable race horses* and that he wanted the car thoroughly cleaned and fumigated, so as to take no chances of his horses being given any disease. (Trans., pp. 16-21.)

(3) On the morning of July 6, 1915, Darden saw said agent of the Express Company (Fenrock), who then explained that he had no car that he could furnish that day, but said he would have a car on the next day, July 7. Thereupon Darden arranged with this agent that he (Darden) would have one-half of said car and "Seamster and others" the other half of the car, and that Darden would leave a check for \$82.50 for his half of the car with his trainer, Henry Loudon, a colored man; and Darden then told said Fenrock that he was going back to Nashville that night and said agent agreed that he would have the car available the next day, and Darden gave him, and he took down, the names of the three attendants who were to accompany the horses in Darden's half of the car, which included Henry Loudon. (Trans., pp. 17, 18.)

(4) The Express Company's agent (Fenrock) understood that Darden was only to get half the car and was only *contracting* with reference to *that half* in which his six horses were to be expressed; and said agent agreed to have Darden's half of the car stalled off for his six horses; and Darden explained to the agent on this morning of July 6, 1915, that Seamster and others would take and pay for the other half of the car, and that said agent was to *collect* for this half from these other men; and an understanding was had between Darden and said agent whereby the former was to get the check of the Latonia Race Track Association for \$82.50, and leave this check with

his trainer Loudon, who would go in the car in charge of Darden's six horses. After this understanding Darden left Latonia on July 6th, and did not know anything about what happened thereafter until five of his six horses which were shipped on the following day (July 7, 1915) and had been killed in the wreck which occurred on the night of that day. (Trans., p. 18.)

(5) Darden never saw any paper or shipping contract; no such contract was proffered to him to sign, and he never authorized any one to sign any contract for him; and the signing of any such contract was never discussed between him and the agent of the Express Company. The only rate quoted Darden by the Express Company's agent was \$165.00 for the entire car, and \$82.50 for half of the car; and no valuation was placed by Darden on his horses, nor was he asked to fix any valuation thereon; and Darden did not know there was any other express rate by which he could ship his horses from Cincinnati, Ohio, to Windsor, Canada, except the rate the agent quoted him. Darden never heard of two express rates; the agent did not say anything to him about any valuation on his horses, nor did he name or fix any values thereon, nor did he ever authorize any one to place any values on his horses, and his trainer, Henry Loudon, a colored man, did not and would not know the value of these horses. (Trans., p. 19.)

(6) Mr. Darden's trainer, Henry Loudon, was present when the Express Company received Mr. Darden's horses on July 7, 1915, and had them loaded into the car in question. He saw Seamster, who was looking after some race horses shipped in the other half of the same car, talking with the Express Company's agent (Fenfrock) and saw this agent and Seamster fixing up a contract. Loudon gave the Express Company's agent the check which Mr. Darden had left with him for his half of the car. Loudon did not sign any shipping contract, and he never saw the alleged shipping contract in question, though he had seen similar contracts before. When the horses were loaded in the car the agent of the Express Company filled in the contract right there at the car, using a book to write on, and this contract was not presented to Loudon for signature at all. The name of this witness (Loudon) appearing signed to the "Attendant's Contract" which is part of the alleged contract of

shipment, was not signed thereon by said Loudon. The Express Company's agent (Fenfrock) was doing the writing when Loudon saw him and Seamster fixing up the contract. No copy of this contract was given to Loudon. (Trans., pp. 21, 22.)

(7) The alleged "Contract of Shipment" had been introduced at a former trial and marked Defendant's Exhibit No. 2 (Trans., p. 22); and this paper the contents of which thus came to the knowledge of plaintiff after the wreck, was shown to the witness Loudon at the last trial below, and was then marked "Plaintiff's Exhibit No. 2" (Trans., p. 22) and as stated above Mr. Darden had never seen the paper before his horses were killed, and his trainer Loudon proved, as above stated, that he had not seen this paper at all, did not sign it, and that no copy of it was given to him.

(8) Seamster testified for plaintiff below, and proved that he was interested in one horse which was among the seven shipped in the other half of the car from the half occupied by Darden's six horses,—there being thirteen horses in the car at the time of the wreck. Seamster testified that it was his signature which appeared as the bottom signature "W. Seamster" at the top of page 3 of said printed contract (Original of Plaintiff's Exhibit No. 2); and that his name appearing as the top signature to the "Attendant's Contract" on page 3 of said original Exhibit, was not signed by him. Seamster did not give any information to the Express Company's agent in regard to the value of any horses in the car. He merely signed the contract at the top of page 3 thereof, because he was asked to do so by the agent, and he owned one horse in the car. Seamster did not read the contract and he was not authorized by Mr. Darden to sign it for him or as his agent; and the Express Company's agent (Fenfrock) knew that he (Seamster) had charge of one-half of the car and that Darden had the other half, and knew that Seamster paid \$82.00 and something for his end of it, in which there were seven horses. There were four different persons owning the seven horses in the half of the car that Seamster settled for with the Express Company's agent; and all Seamster undertook to do was to collect the money from the others in this half of the car and pay the agent of the Express Company for that half. Seamster did not "undertake to exercise any right or

make *any representations or do anything* with reference to the end of the car that Mr. Darden's horses occupied"; nor did he undertake to make any payment therefor; and he told the Express Company's agent that he was merely paying for one-half of the car, and to get the other half from Mr. Darden's man, Louden. (Trans., pp. 33, 34.)

(9) In regard to the statement, "13 running horses, value \$100.00" appearing written in on page 2 of the alleged contract of shipment (original of Plaintiff's Exhibit No. 2 accompanying the record; Trans., p. 24) Seamster did not write this into this contract; and while there were thirteen horses in the car Seamster was only interested in one, and had charge of two others, while three other men owned the other four, thus making up the seven horses in one-half of the car; and the plaintiff Darden owned the six horses in the half of the car which Darden settled for; and Darden never authorized Seamster to sign any contract for him; and the Express Company's agent (Fenrock) knew that Seamster was not the "agent of the owner" of said Darden's horses, and Seamster told this agent that he would have to collect for the horses in Darden's half of the car from Darden's man, Louden. (Trans., p. 34.)

(10) It was *expressly admitted* by the Express Company in the Court below, in response to a direct question from the trial judge, that there was "*no deception*" practiced by Mr. Darden at all. (Trans., p. 39.)

The above is the substance of the uncontradicted testimony contained in the bill of exceptions, which was introduced in the District Court below by the plaintiff Darden and his witnesses in regard to the way and manner in which the shipment of the horses in question was *received* by the Express Company and the transportation charge paid by the plaintiff Darden as to his horses. As stated above, the Express Company's agent (Fenrock) did not testify at all, and no one testified for the Express Company in regard to any of these matters; and thus the so-called "Contract of Shipment" (original Plaintiff's Exhibit No. 2 accompanying the record; Trans., pp. 22-28) appears *admittedly* to be a paper which was never signed by Mr. Darden nor any one authorized to act for him, and never seen by Mr. Darden nor any one authorized to act for him prior to the first trial of

this case in the District Court below, and the valuation of the horses at \$100.00 each stated therein was a thing that neither Mr. Darden nor any one authorized to act for him ever knew anything about at all until after the horses in question were killed; and no such valuation was placed upon these horses by Mr. Darden or by any one authorized to act for him; and the Express Company's agent (Fenfrock) *knew this*, and *knew* they were "very valuable race horses," and himself *falsely* and *fraudulently* "filled in" this contract, and never gave any copy thereof to Mr. Darden nor to any one authorized to act for him; and all the above is *not denied at all* by any one for the Express Company.

In addition to the above undisputed evidence contained in the bill of exceptions, there is also contained therein a copy of the alleged "Contract of Shipment" (Trans., pp. 22-28); copies of certain published tariffs and express classifications certified by the Secretary of the Interstate Commerce Commission, filed as defendant's Exhibits No. 4 and No. 5 (Trans., pp. 27, 28),—the originals of these tariffs and classifications accompanying the record by order of the District Judge (Trans., pp. 28, 58); and a copy of the order of the Interstate Commerce Commission made on May 25, 1915, known as "Supplemental Order No. 13," which incorporates the terms and provisions of the "Uniform Express Receipt" as this was attempted to be formulated by the Interstate Commerce Commission after the passage and "in the light of the Cummins Amendment to the Act to Regulate Commerce" (Trans., p. 29); and a comparison of the so-called "Contract of Shipment" with this order of the Interstate Commerce Commission will show that same was not made out by the Express Company's agent in conformity with the said "Supplemental Order No. 13" of the Commission, which provided that the *shipper* must declare the "actual value" of each animal shipped or the "shipment must be declined." (Trans., p. 32.)

In addition to the above, the bill of exceptions contains the testimony of the plaintiff below, Mr. Darden, and his witnesses, showing the value of the five race horses in question which were killed by the negligence of the Express Company and its agent, the Railroad Company, and this uncontradicted testimony shows that the horses were reasonably worth *almost double* the amount

of damages which the verdict of the jury and the judgment below awarded to the plaintiff Darden. (Trans., pp. 20, 33, 34.)

The bill of exceptions also shows that plaintiff below established, and that indeed it was finally *stipulated*, that the Express Company "received" the horses in question from the plaintiff for transportation and had them loaded into the car, and routed same over the railroad upon which the wreck occurred on the through journey from Cincinnati, Ohio, to Windsor, Canada,—thus bringing the claim and suit of the plaintiff squarely and admittedly under the protection of the Cummins Amendment of March 4, 1915 (Trans., p. 35); and the bill of exceptions also shows that the jurisdiction of the Court below, upon the ground of diverse citizenship, was also made to appear, and was indeed stipulated to exist. (Trans., p. 35.)

The bill of exceptions, after setting out how the plaintiff called evidence showing the undisputed facts in regard to the circumstances under which the Express Company *received* these horses for shipment, and tending to show the negligence of the Express Company and its agents, and establishing the value of the five horses killed (Trans., pp. 17-37), and then setting out the stipulation as to the jurisdiction of the Court and the nature of the through shipment of the horses from a point in Ohio to a point in a foreign country adjoining the United States (Trans., p. 35),—then recites that the foregoing was all the evidence introduced by the plaintiff in chief on the trial in the Court below—

—"except the evidence of *numerous witnesses not included herein* who testified to facts tending to prove and establish that the wreck in question and the consequent killing of plaintiff's horses, was proximately caused by the *negligence* of defendant Adams Express Company and its agent the Railway Company, which owned the car in question and was transporting the same for the Adams Express Company at the time and place of the accident and wreck; and tending to show that said wreck *was not* caused by any act of God—i. e., the storm prevailing at the time and place of the wreck in question." (Trans., p. 35.)

The bill of exceptions next shows that at the conclusion of the evidence introduced by the plaintiff below in chief, the Express Company made certain technical motions, which were in

the very *face* and *teeth* of the express provisions of the Cummins Amendment of March 4, 1915, as follows: (1) to have the Court withdraw from the jury all the evidence offered by plaintiff below in regard to the value of his horses which had been negligently killed; (2) to have the Court withdraw and exclude from the jury all the evidence tending to show the circumstances under which the Express Company received for transportation and undertook to ship the horses in question, on the ground that such evidence "tends to vary the terms and provisions of the published tariffs filed with the Interstate Commerce Commission," and which governed the shipment in question; and (3) to dismiss the plaintiff's suit because it appeared that the plaintiff shipped his horses on a valuation which was less than actual value, contrary to the filed and published tariffs governing the shipment; and these motions, of course, were overruled by the learned trial judge, who naturally felt constrained to follow the plain language of the Cummins Amendment of March 4, 1915. (Trans., pp. 36-40.)

After the above mentioned motions of the Express Company had been overruled by the trial judge at the close of the testimony offered in chief by the plaintiff below, all that the bill of exceptions shows in regard to any proof introduced by the Express Company, as defendant in the Court below, in an effort to make out its defence, and by the plaintiff Darden in the Court below, in rebuttal thereof, is the following:

"Thereupon the defendant introduced proof tending to show that the wreck (which occurred about 12 miles above Cincinnati, Ohio, on the lines of the P., C., C & St. L. Railway and *while the shipment was en route from Latonia, Kentucky, to Windsor, Canada*) and the consequent destruction of five of the six horses shipped by the plaintiff resulted from an act of God, viz.: a violent windstorm, and that no negligence of the Railway proximately contributed to the accident to, and death of plaintiff's property; and the defendant did not offer evidence upon any other question or subject; and thereupon the defendant rested its case.

"The plaintiff then introduced testimony of *experts* in rebuttal, tending to show that the wreck as a result of which the plaintiff's horses were killed *was not proximately caused or contributed to by the windstorm prevailing at the time and place thereof.*" (Trans., pp. 36, 37.)

All of the above, which is the *entire showing* made by the bill of exceptions,—demonstrates, we respectfully submit, an utter *lack of any substance or merit* in any question now sought to be made in this Court by the Express Company, which is here in the attitude of admitting its *negligence*, admitting the justice of the *quantum* of the recovery, and admitting the *application* of the Cummins Amendment of March 4, 1915, to the claim and suit of this shipper, Mr. Darden,—while said Express Company is merely endeavoring to make certain technical questions which we confess we do not understand, because they are in direct *opposition* to and in direct *contradiction* of the *very terms* and *provisions* of said Cummins Amendment, the constitutionality of which our learned adversaries are not attacking at all and, of course, cannot successfully attack.

No question was ever made upon the correctness of the charge delivered to the jury by the learned District Judge; and therefore said charge does not appear in the bill of exceptions. (Trans., p. 40.)

For the ready convenience of the Court we next set out below the Assignment of Errors in this Court *in full*.

ASSIGNMENT OF ERRORS.

The entire Assignment of Errors in this Court is as follows:

"The Circuit Court of Appeals erred in not holding the Trial Court erred in the following particulars:

"I. In refusing to grant defendant's motion, made at the conclusion of the plaintiff's testimony, which motion was:

'The defendant moves the Court to withdraw and exclude from the consideration of the jury all evidence relating to the question of the value of the horses involved in this suit being contained in the testimony of plaintiff W. W. Darden, E. R. Bradley and K. Spence, on the ground that said evidence tends to vary the terms and provisions of the written contract of shipment introduced by the plaintiff as evidence in this case, and also tends to vary the written terms of the contract prescribed by the Interstate Commerce Commission in the filed and published tariffs under which this shipment is made.'

"II. In refusing to grant the defendant's motion, made at the conclusion of plaintiff's evidence, as follows:

'Comes the defendant and moves the Court to withdraw and exclude from the consideration of the jury all evidence offered on behalf of the plaintiff tending to show any agreement, understanding or promise on the part of defendant's agent to furnish the plaintiff with any particular kind of car on any particular date, upon the ground that such evidence tends to vary the terms and provisions of the published tariffs filed with the Interstate Commerce Commission and which govern the shipment in question. This evidence was in the testimony of the plaintiff himself, wherein he testified that the defendant's agent agreed to furnish him with a steel car, etc.'

"III. In refusing defendant's motion, made at the conclusion of all the evidence, as follows:

'Comes the defendant and renews its motion, made at the conclusion of the plaintiff's testimony in this cause to dismiss the plaintiff's suit because the plaintiff had by his own testimony disclosed to the Court the illegality in the contract upon which his suit was based, in that it appears that the plaintiff shipped his horses on a valuation which was less than actual value, and resulted in the plaintiff receiving a rebate for the shipment of his horses, contrary to the filed and published tariffs governing this shipment.'

"IV. In refusing to grant defendant's motion, made at the conclusion of all the evidence, as follows:

'Comes the defendant and moves the Court to direct the jury to return a verdict for the defendant, because:

(a) The plaintiff by his own testimony disclosed to the court the illegality in the contract upon which his suit is based, in that it appears the plaintiff shipped his horses on a valuation which was less than actual value, and resulted in the plaintiff receiving a rebate for the shipment of his horses, contrary to the filed and published tariffs governing the shipment.

(b) Because it appears from the plaintiff's declaration, and the evidence offered on behalf of the plaintiff, that he based his suit on an alleged oral contract, entered into between the plaintiff and an agent of the defendant, which oral contract is not permissible under, and is contrary to the published tariffs filed with the Interstate Commerce Commission, and is, therefore, illegal, and void and cannot be made the basis of a recovery.

(c) Because the contract entered into between the plaintiff and the agent of the defendant, under which the shipment of horses was made, is in violation of the statutes of the United States and therefore, illegal and void and cannot form the basis for a recovery in favor of the plaintiff, in that they are not in accordance with filed and published tariffs such as are required by the statutes governing the transportation of interstate commerce.'

"V. In denying this defendant's motion for a new trial. (Trans., p. 15.)"

(Brief and Argument for Plaintiff in Error, pp. 5-7.)

We will next in the form of a brief endeavor pointedly to present some propositions of law, with the supporting decisions of this Court cited under each proposition; and in this manner will trace the *development* of the law and show the *reasons* for the passage of the Cummins Amendment of March 4, 1915,—the explicit terms and provisions of which control, and obviate all of the foregoing assignments of error.

BRIEF.

Propositions of Law:

We present below certain legal propositions which we submit are not open to controversy, and are controlling of all the questions sought to be presented by the Express Company in this case:

(1) It was long ago well settled as a general proposition that a common carrier cannot by contract *exempt* itself from liability for loss by negligence.

York Mfg. Co. v. Illinois Central Railroad, 3 Wall., 107;
Railroad Co. v. Lockwood, 17 Wall., 357-375;
Bank of Kentucky v. Adams Express Company, 93 U. S. 174.

(2) It was later held and settled that a contract for "limited liability," when fairly made, did not contravene the settled principle of the common law preventing the carrier from contracting against liability for negligence; and the *distinct ground* of this holding was that where such contract for limited liability was *signed by the shipper and fairly made*, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, such contract would be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight received, and of protecting the carrier against extravagant and fanciful valuations.

Hart v. Pennsylvania Railroad, 112 U. S., 331, 343.

(3) The *Hart* case last above cited was followed by a long line of harmonious decisions construing limited liability contracts, both before and after the Carmack Amendment. Although the language of said Carmack Amendment to the Hepburn law, as amending Section 20 of the Act to Regulate Commerce of February 4, 1887, declared that the carrier should be liable "for any loss, damage or injury" to property received for transportation which was "caused by it" or any connecting carrier—this Court held that said Carmack Amendment, making the initial carrier liable not only for its own negligence, but the negligence of connecting carriers, did not operate to prevent

the carrier from making a contract for *limited liability* where the contract was *fair* and the *lower rate* secured by the shipper was obtained upon the faith of an *agreed valuation* of the property shipped. This construction of the Carmack Amendment was announced by this Court, speaking through Mr. Justice Lurton, in the case of *Adams Express Company v. Croninger*, 226 U. S., 491-503; and following this decision there was a line of cases decided in which this Court continued to administer this same rule in construing and applying the Carmack Amendment.

Adams Express Co. v. Croninger, 226 U. S., 491;
Wells Fargo Co. v. Nieman-Marcus Co., 227 U. S., 469;
Kansas So. Ry. v. Carl, 227 U. S., 639;
M. K. & T. Ry. v. Harriman, 227 U. S., 657.
Chicago, R. I. & P. Ry. v. Cramer, 232 U. S., 490;
Boston & Maine R. R. v. Hooker, 233 U. S., 97.
A. T. & S. F. Ry. v. Robinson, 233 U. S., 173;
Pierce Co. v. Wells Fargo & Co., 236 U. S., 278.

(4) Before the passage of the Carmack Amendment, many of the States had common law rules or had enacted statutes declaring the carrier liable for the *full actual value* of or *damages* to property destroyed or injured in transit, *notwithstanding* agreed valuations or attempted stipulations to the contrary in the bill of lading; and these State statutes had been uniformly sustained and upheld by this Court.

In the *Solan* case, such an Iowa statute, and in the *Hughes* case, such a Pennsylvania rule, were so upheld; and in the *Croninger* case, which was decided after the passage of the Carmack Amendment, the Court, speaking through Mr. Justice Lurton, declared that if the Kentucky statute involved in that case could still be regarded as existing, it would result that the carrier was liable for the *full valuation* of the property, notwithstanding its agreed or declared value in the bill of lading.

Chicago, Milwaukee, etc. Railway v. Solan, 169 U. S., 133;
Pennsylvania R. R. Co. v. Hughes, 191 U. S., 477;
Adams Express Co. v. Croninger, 226 U. S., 491, 501-13.

(5) In the *Croninger* case, *supra*, it was held, however, that with the passage of the Carmack Amendment the field of Federal legislation was thereby occupied by this Act of Congress, and that all State statutes and rulings undertaking to declare the carrier liable for full value and damages *notwithstanding* attempted limited liability contracts with the shipper, were

superseded and became inoperative and passed out of existence, so far as interstate commerce or shipments were concerned; and this ruling was continuously and consistently followed until the passage of the Cummins Amendment of March 4, 1915.

Adams Express Co. v. Croninger, 226 U. S., 491, and other cases cited under proposition 3 *supra*.

(6) It was to *meet the above situation*, in which it was held that the Carmack Amendment had superseded these State statutes and rulings exacting full liability, and to *obviate the construction* placed upon the Carmack Amendment in the *Croninger* case, by which it was held that notwithstanding the language of said act of Congress carriers could still make such limited liability contracts, when same were fairly made and the reduced rate obtained was based upon the declared value of the shipment—that the Cummins Amendment of March 4, 1915, was passed.

The reports of the Senate and House committees, and the debates in Congress, demonstrate that this is so, and the Courts have consistently recognized this and ruled accordingly.

Chicago, etc. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S., 97-100.

McCaull-Dinsmore Co. v. Chicago, etc. Ry. Co. (D. C., Minnesota, 4 Div.), 252 Fed., 664.

Chicago, M. & St. P. Ry. v. McCaull-Dinsmore Co. (C. C. A., 8th Circuit), 260 Fed., 835;

Alaska S. S. Co. v. U. S. (D. C., Sou. Dist., New York), 259 Fed., 713, 718-722.

Congressional Record, 63rd Congress, 2nd Session, Vol. 51, pp. 9619-9626, 9777-9783;

Congressional Record, 63rd Congress, 3rd Session, Vol. 52, pp. 5446-5451;

(7) The Cummins Amendment of March 4, 1915, expressly declares *liability for full value and damage* in a case like the one at bar; and its language is so explicit, unambiguous and sweeping, and the purpose of its passage and enactment is so manifest and well recognized, that the very language of this amendment meets and overturns all contentions of the Express Company under its Assignments of Error and the uncontroverted facts of this case.

38 Stat. L., 1196, 1197;

Quoted at length *Post*, pp. 70-72.

No argument grounded on "convenience," and no argument based upon the "history" of the statute, or upon the "policy" of the later act of August 9, 1916, c. 301, 39 Stat., 441 (known as the "Second Cummins Amendment"), can prevail against the plain meaning of the words of the Cummins Amendment of March 4, 1915, and the Courts, including this Court, have expressly so ruled and declared.

Chicago, etc. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S., 97, 99-101;

Chicago, M. & St. P. Ry. v. McCaull-Dinsmore Co. (C. C. A., 8th Circuit), 260 Fed., 835-837;

McCaull-Dinsmore Co. v. Chicago, etc. Ry. Co. (D. C.), 252 Fed., 654-667;

Alaska S. S. Co. v. U. S. (D. C.), 259 Fed., 713-715, 716, 718-722.

(8) The holding of the District Judge and the Circuit Court of Appeals below are in square accord with the ruling made by all the Courts before which the Cummins Amendment of March 4, 1915, has come for construction; and, as pointed out by the learned District Judge below, the proceedings in Congress when said Amendment was finally shaped up and passed, emphasize the correctness of the rulings below, which are now under attack.

Rulings of Hon. E. T. Sanford below. (Trans., pp. 38, 39.)

(9) The contention of the Express Company that the plaintiff Darden, notwithstanding the plain language of the Cummins Amendment of March 4, 1915, cannot recover his full actual loss or damage because the alleged "Contract of Shipment" must be held void and unenforceable as permitting a "rebate" in violation of the provisions of the Act to Regulate Commerce as same existed prior to the passage of said Cummins Amendment—amounts to an insistence without merit. It is now well settled that when a statute imposes specific penalties for its violation where the act is not *malum in se* and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the legislative intent to render such contracts illegal and unenforceable.

Opinion of Circuit Court of Appeals (Trans., p. 51), 286 Fed., pp. 65, 66.

Harris v. Runnels, 12 How., 79, 84, *et seq.*

Farmers & Mechanics Bank v. Deering, 91 U. S., 29-35;

Fritts v. Palmer, 132 U. S., 282, 289, 293;

Connolly v. Union Sewer Pipe Co., 184 U. S., 540, 545;
Yates v. Jones Nat. Bank, 206 U. S., 158-179.
Dunlop v. Mercer (C. C. A., 8), 156 Fed., 545, 555.

Moreover, in the instant case plaintiff Darden planted his right to recover, not on defendant's liability as an insurer, but on its positive and proximate negligence in making the shipment in question in a wholly unfit car. Defendant having accepted plaintiff's horses for transportation as a common carrier became a bailee thereof, and cannot escape liability for its own negligence while in possession of the horses on the ground that the original contract of carriage was illegal; and especially is this so since the Cummins Amendment of March 4, 1915, declares full liability in such a case "notwithstanding" the provisions of "any contract" or "tariff," etc.

Merchants, etc. Co. v. Insce. Co., 151 U. S., 368, 387, 388;
 Opinion of Circuit Court of Appeals in instant case (Tr., pp. 51, 52), 286 Fed., 61, 66, 67.

(10) We do not understand that the constitutionality of the Cummins Amendment of March 4, 1915, is under attack in the instant proceeding. This amendment has been construed and administered by this Court in the case of *Chicago, etc. Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S., 97-100, and of course it results from the opinion of this Court in the *Croninger* case, which upheld and construed the Carmack Amendment, as well as the previous opinions of this Court upholding State statutes which declared full liability before the passage of the Carmack Amendment, that the Cummins Amendment of March 4, 1915, is unquestionably constitutional and valid legislation.

Adams Express Co., v. Croninger, 226 U. S., 491, 500;
Chicago M. & St. Paul Ry. v. Solan, 169 U. S., 133-137;
Pennsylvania R. R. Co. v. Hughes, 191 U. S., 477, 487, 491.

(11) By the act of August 9, 1916, Ch. 301, 39 Stat. L., 441, known as the "Second Cummins Amendment," the fourth from the last *proviso* of the Cummins Amendment of March 4, 1915, was amended so as to read as follows:

"*Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and de-*

claring any such limitation to be unlawful and void, shall not apply, *first*, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; *second*, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses."

39 Stat. L., Ch. 301, p. 441.

Fed. Stat. Anno. Sup., 1918, pp. 387, 388.

The above mentioned Act of Congress of Aug. 9, 1916, Ch. 301, 39 Stat. L., 441, known as the Second Cummins Amendment, was before this Court for construction in a recent case.

American Ry. Express Co. v. A. J. Lindenburg, 260 U. S., 584-592; 67 L. Ed., 227-231.

This Act of August 9, 1916, amending the Cummins Amendment of March 4, 1915, can, of course, have no bearing on the instant controversy. As to this the Court of Appeals in its opinion in the instant case, said:

"The situation as respects the contract in this case is not changed or affected by the Second Cummins Amendment (Act Aug. 9, 1916, Ch. 301, 39 Stat. 441—passed more than a year after the making of the contract and shipment here in question) which second amendment excepts from the prohibition against limitation of liability 'property, *except ordinary livestock*, received for transportation, concerning

which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property,' etc." (Trans., p. 50.)

The only questions sought to be presented by plaintiff in error in this case arise from the effort of the Express Company, by some process of reasoning (which we admit we do not understand) to take this case and its admitted facts out of the *plain* and *unmodified language* of the Cummins Amendment of March 4, 1915.

In the hope that it may be of some service, or possibly of some convenience to the Court, we next proceed with some more detail to present an Argument, in the course of which, for convenient reference, we will quote to some extent from the relevant decisions of this Court and the lower courts, including the opinions in the case in which the Cummins Amendment of March 4, 1915, was construed and finally came before this Court,—as well as from the relevant proceedings in the Congress when said statute was passed.

ARGUMENT.

State of the Law when the Cummins Amendment of March 4, 1915, was Passed; and the Purpose and Scope of that Amendment.

As hereinbefore stated it was well settled by the decisions of this Court at an early day that a common carrier could not by contract *exempt* itself from liability for loss by negligence, and we have hereinbefore, under our proposition (1) in the Brief, cited the decided cases to that effect. (*Ante*, p. 24.)

In the case of *Hart v. Pennsylvania Railroad*, 112 U. S., 331, it was clearly held and settled that a contract for limited liability by a common carrier to a shipper, when fairly made, did not contravene the settled principle of common law preventing the carrier from contracting against liability for its negligence. In this case, in summing up the view of the Court, it was said:

"The *distinct ground* of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is *fairly made*, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Squire v. New York Central R. R. Co.*, 98 Mass., 239, 245, and cases there cited."

112 U. S., 343.

The above case was followed by a long line of harmonious decisions construing limited liability contracts both before and after the Carmack Amendment.

The Carmack Amendment to the Hepburn Law, as amending Section 20 of the Act to Regulate Commerce of February 4, 1887, for ready reference can be found printed in the margin of the report of the case of *Adams Express Co. v. Croninger*, 226 U. S., 503.

After the passage of the Carmack Amendment it was construed by this Court in a line of cases in connection with limited liability contracts, and in these cases it was held that the Carmack Amendment, making the initial carrier liable not only for its own negligence but the negligence of connecting carriers, did not operate to prevent the carrier from making a contract for limited liability, where the contract was fair, and the lower rate obtained by the shipper was allowed upon the faith of an agreed valuation of the property—notwithstanding the language of the Carmack Amendment that the carrier should be liable “for any loss, damage or injury” to the property “caused by it” or any connecting carrier. In other words, after the Carmack Amendment, this Court, speaking through Mr. Justice Lurton in the *Croninger Case*, continued to administer the principle announced in the *Hart Case*, and in the course of the opinion, quoting that case, said:

“The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed upon. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purpose of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is *no deceit* practiced on the shipper, should be upheld.”

226 U. S., 510, 511.

Following the *Croninger Case* (226 U. S., 493) there were numerous other cases in which this Court administered the same rule in construing the Carmack Amendment.

Adams Ex. Co. v. Croninger, 226 U. S., 491.
Wells, Fargo & Co. v. Neiman-Marcus Co., 227 U. S., 469;
Kansas Sou. Ry. v. Carl, 227 U. S., 639;
M. K. & T. Ry. v. Harriman, 227 U. S., 657;
Chicago, R. I. & P. Ry. Co. v. Cramer, 232 U. S., 490;
Boston & Maine R. R. v. Hooker, 233 U. S., 97;
A. T. & S. F. Ry. v. Robinson, 233 U. S., 173;
Pierce Co. v. Wells, Fargo & Co., 236 U. S., 278-287.

Before the passage of the Carmack Amendment, many of the States enacted statutes or enforced common law rules declaring and holding the carrier liable for the full actual value

of or damages to property destroyed or injured in transit, notwithstanding agreed valuation or attempted stipulation to the contrary in the bill of lading or contract of shipment; and these State statutes and rulings were uniformly upheld and sustained by this Court.

In one case before this Court such an Iowa statute was upheld; in another, such a Pennsylvania ruling was upheld; and in the *Croninger* case the Court, speaking through Mr. Justice Lurton, declared that if the Kentucky statute involved in that case could still be regarded as controlling, it would result that the carrier was liable for the full valuation of the property, notwithstanding its agreed or declared value in the contract of shipment.

Pennsylvania R. R. Co. v. Hughes, 191 U. S., 477;

Chicago, Milwaukee etc. Ry. v. Solan, 169 U. S., 133;

Adams Express Co. v. Croninger, 226 U. S., 491, 501-513.

In the *Croninger* case, *supra*, it was held, however, that with the passage of the Carmack Amendment this Federal legislation superseded and rendered inoperative, so far as interstate shipments were concerned, all the statutes and common laws of the several States undertaking to declare full liability against common carriers, notwithstanding attempted limited liability contracts.

And it was to meet and obviate the above state and condition of the law resulting from the construction of the Carmack Amendment announced in the *Croninger* case, that the Cummins Amendment of March 4, 1915, was passed. The proceedings in Congress clearly and expressly show this; and the decisions of the Courts before which the Cummins Amendment of March 4, 1915, later came for construction and enforcement, expressly recognize and declare this to be true—as we shall later see.

In the original report of April 6, 1914, made by the Committee on Interstate Commerce to the Senate of the 63d Congress, Second Session (Report No. 407), recommending the passage of the Cummins Amendment in the form approved by said committee, it is stated:

"While at common law common carriers could not escape the consequences of their negligence by stipulating for a release of liability, either in whole or in part, yet the common law, as interpreted by the Supreme Court of the United States, and by the appellate court of some States, recognized

as valid agreements between shippers and common carriers limiting the liability of the carrier to an agreed amount. In some cases the limitation was sustained on the theory that the shipper was estopped by his representations of value to claim a larger amount, and in other cases upon the theory that the shipper had received a lower rate for the transportation of his property than would have been given him had the actual value been stated. Many States have statutes forbidding such limitations and requiring carriers to respond in the full amount of loss, damage, or injury occasioned by their negligence, and in some States the courts of last resort construed the common law to forbid such limitation.

"The Supreme Court of the United States held in the case of the *Pennsylvania Railroad Co. v. Hughes*, (191 U. S., 477), that, notwithstanding it had held in many decisions to the contrary, the decision of the Supreme Court of Pennsylvania in that case to the effect that all agreements limiting the liability to less than the actual loss or damage were void at common law should govern and be affirmed, and in the case of *Solan v. Chicago, Milwaukee & St. Paul Railroad Co.*, (169 U. S., 133), the Supreme Court of the United States affirmed the decision of the Supreme Court of Iowa, which held valid a statute that forbade any limitation of the liability of a carrier for negligence and requiring it to pay full amount of loss, damage, or injury.

"The so-called Carmack Amendment, adopted in 1906, construed by the Supreme Court of the United States in the case of *Adams Express Co. v. Croninger*, and in other cases, had the effect of abrogating State laws forbidding limitations in bills of lading and receipts on the liability of carriers for negligence and consequent damage or injury to property transported in interstate commerce. The Amendment was held to be a Federal regulation of interstate commerce, dealing with the rights of carriers and shippers under bills of lading and not prescribing full liability for damage or injury to property transported in interstate commerce, and that limitations of recovery to less than actual loss or damage caused by the carrier in bills of lading or receipts are valid.

"It is, of course, necessary, where the property shipped is hidden from view by wrapping, that the representation as to value made by the shipper shall in all cases be binding upon him. This exception covers a large number of articles shipped in interstate commerce, and especially many of those carried by express companies."

Said Cummins Amendment, as same was reported by the Senate Committee on Interstate Commerce, was, however, amend-

ed on the floor of the Senate after considerable debate. These debates not only show in many connections what was shown by the report of the Senate Committee quoted above (that the Cummins Amendment was intended to meet and obviate the holding in the Croninger case, as this case had developed "defects" in the Carmack Amendment), but also show the particular abuse by the carriers which made necessary the passage of the Cummins Amendment

An examination of the Congressional Record of the 63d Congress, 2d Session, Vol. LI, at pages 9623 and 9624, shows that Senator Cummins, among other things, said:

"A man drives his carload of steers to town to send them to Chicago from my State, and there is put before him by the railroad company a bill of lading or a contract, which contains a declaration as to the value of those steers. The shipper signs that declaration. Of course, the declaration is well known to everybody to be false; I mean as to value. The shipper says the steers are worth \$25, or \$50 apiece; and the liability of the railroad company is limited to that amount. The shipper has no more chance to enter into an agreement with the railroad company upon even terms than a child would have in a wrestling match with a prize fighter."

And on the same page of this volume of the Congressional Record it appears that Senator Reed (who succeeded in having an amendment to the Act as reported by the Senate Committee adopted by the Senate, which amendment made the Act still more liberal to shippers, and still more restricted the power of the Interstate Commerce Commission in regard to establishing rates dependent upon value, and which amendment shaped up the *proviso* to the Cummins Amendment as it was finally passed by both houses, and signed by the President) had this to say:

"Mr. President: I think the difficulty here does not lie in the fact that a rising rate charge is imposed, but it lies in the fact that the railroad being given the power to fix a rising rate, uses that power in such a way as to practically *force a limitation on the liability* they incur; in other words, let us say the ordinary shipping rate is \$50 a car, and that that is a *fair rate*. They hand the shipper a contract limiting the liability to one-tenth of the real value; he has the option to sign that contract or to pay \$100 a car; *and by that device they force him to take the risk which the law seeks to impose upon them.*"

Cong. Rec., Senate, p. 9624.

In other words, the Cummins Amendment as the same was passed by the Congress and approved by the President, was enacted to prevent a carrier from doing just what the Express Company is endeavoring to accomplish in the case at bar—that is, practice a *device* which forces the shipper to take the risk which the law seeks to impose on the carrier, while the carrier at the same time is receiving a reasonable and acceptable rate for the shipment.

We will next call your Honor's attention to the decided cases in which the Courts, including this Court, have had occasion to construe the Cummins Amendment of March 4, 1915, and in which effect has uniformly been given to the unambiguous and plain language of this Act of Congress, and in which the reasons for the passage of the Act and the abuses which it sought to remedy, are recognized and stated.

**McCaull-Dinsmore Co. v. Chicago, Etc.,
Ry Co., 252 Fed., 664.**

The above case which came first before Morris, District Judge, in Minnesota, was decided August 23, 1918.

In the above case it was held that under the Cummins Amendment where wheat was lost in transit the carrier was liable for the value of the grain at the "point of destination"—notwithstanding the shipment was made under a contract known as a "Uniform Bill of Lading," which was part of the published tariffs filed with the Interstate Commerce Commission, and which provided that the loss should be computed on the value of the property—"at the time and place of shipment."

It will be observed that in the above case said tariffs provided among other things a rate of transportation based on and controlled by said bill of lading or contract; and said tariffs further provided that in cases where the shipper was not agreeable to shipping under the terms of said contract or bill of lading, then a *higher rate* of transportation was provided by said tariffs.

The District Court administered the Cummins Amendment according to its *clear terms*, and held the carrier liable for the full, actual loss, on the basis of the value of the grain at the point of *destination* as the common law required, notwithstanding the fact that the tariff had provided that the damages should be ascertained on the basis of the value at the time and place of the shipment if the cheaper rate was used by the shipper, and notwithstanding the fact that the shipper had shipped *on said cheaper rate*.

In the course of its opinion the Court, in speaking of the Cummins Amendment, said:

"This amendment was passed after the decisions of the Supreme Court on the Carmack Amendment (Act June 29, 1906, Ch. 3591, Sec. 7, pars. 11, 12, 34 Stat., 595), cited by counsel had been rendered, and it is apparent from its language that its proposal and enactment were caused by these decisions, and that it was aimed directly at them. Viewed in the light of those decisions and of the purpose evidently sought to be accomplished, it is difficult to see how its language could be more sweeping:

" 'Shall be liable . . . for the full *actual loss* caused by it . . . notwithstanding *any limitation*' (the italics are mine) 'of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and *any such limitation*, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void.'

"This is the language of the amendment so far as it touches this case. The first proviso indicates the cases, of which this is not one, and the only cases, exempt from that language, and the only way in such cases of avoiding its terms, and thus *emphasizes*, and, if that were possible, makes more sweeping those terms. I do not see that it can make any difference under the language quoted that this bill of lading was provided for in the schedule of rates filed with the commission, and that that schedule of rates also provided another bill of lading under which, if issued and accepted, the rate would have been higher." 252 Fed., 665, 666.

And the Court, in the above case, thus held (just as his Honor the District Judge below held in the case at bar; Trans., pp. 38, 39, 40), that the Interstate Commerce Commission had been

without power to make any ruling or approve any tariff which permitted a rate based on less than actual value, except in the particular cases specified in the Cummins Amendment, where the goods shipped were hidden and their nature was not disclosed to the carrier; and in this connection the Court also said:

"From the foregoing simple statement, I do not see how it is possible to escape the conclusion, upon a fair and open-minded consideration of the language of the amendment and the obvious and well-known meaning of its terms, that this provision or stipulation in the bill of lading is a limitation of the liability of the carrier and of the amount of recovery, and is therefore unlawful and void. In reaching this conclusion I have not failed to consider the very able argument of counsel for defendant, and also what has been said by the Interstate Commerce Commission, and it is with regret and not a little misgiving that I find myself in difference with men so able and experienced in such matters. But consider the matter as I may, I am always irresistibly brought back to this simple statement and to the necessary conclusion therefrom."

252 Fed., 666.

The above case came before the Circuit Court of Appeals of the Eighth Circuit and is reported under the style of—

Chicago M. & St. P. Ry. Co. v. McCaull-Dinsmore Co., 260 Fed., 835.

The Circuit Court of Appeals of the Eighth Circuit, consisting of Hook and Stone, Circuit Judges, and Amidon, District Judge, affirmed the holding of the District Judge below. The Circuit Court of Appeals consumes by far the larger part of its opinion in the above case in merely quoting the language of the Cummins Amendment—and then the Court says, by way of answering a *similar argument* to that advanced by our learned adversaries in the case at bar:

"The railway seeks to avoid the application of this provision by contending that it, in the present instance, has not sought to limit its liability, but has, on the contrary, defined liability for the full actual loss, and has by its tariffs thus crystallized the method of arriving at the actual loss. We deem such contention unsound. There was no uncertainty as to the time or place of estimating value under the rule of common law—it was the destination. The

evident purpose of the provision in the bill of lading was not to introduce certainty, but to avoid the rule existing at law, for the obvious object of escaping a *higher valuation* which would often arise at destination. Such a provision is unquestionably a limitation, since it forbids application of the established rule."

260 Fed. 836.

And in the above case the Court concluded its opinion with the following:

"The Cummins Amendment was not concerned alone with preventing contracts *already illegal* under the common law, but with prohibiting all agreements having the effect defined by that statute. Congress passed this act to remedy the defects in the Carmack Amendment (Act June 29, 1906, Ch. 3591, sec. 7, pars. 11, 12, 34. Stat., 595, Comp. St., secs. 8604a 8604aa), as developed in the case of *Adams Express Co. v. Croninger*, 226 U. S., 491, 33 Sup. Ct., 148, 57 L. Ed., 314, 44 L. R. A. (N. S.), 257, and intended thereby to *fully and finally prevent all limitations of this character*. Congressional Record 63d Congress, 3rd Session, Vol. 52, pp. 5446-5451."

260 Fed., 837.

The above case then finally came before this Court, and is reported under the style of

**Chicago, Etc., Ry. Co. v. McCaull-Dinsmore
Co., 253 U. S., 97-100.**

After a brief statement of the case and quoting certain terms and provisions of the Cummins Amendment, this Court, speaking through Mr. Justice Holmes, commented upon the decisions of the Interstate Commerce Commission in upholding the provision and regulation in question, as contained in the tariff, both before and after the passage of the Cummins Amendment. In this connection this Court said:

"Before the passage of this amendment the Interstate Commerce Commission had upheld the clause in the bill of lading as in no way limiting the carrier's liability to less than the value of the goods but merely offering the most convenient way of finding the value. *Shaffer & Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 21 I. C. C., 8, 12. In a subsequent report upon the amendment it considered that the clause was still valid and not forbidden by the law, 33

I. C. C., 682, 693. The argument for the petitioner suggests that courts are bound by the Commission's determination that the rule is a reasonable one. But the question is of the *meaning of a statute* and upon that, of course, the courts must decide for themselves."

253 U. S., 99.

And then, by way of declaring that the language of the Cummins Amendment was very plain and explicit, and did not leave any basis for any argument grounded upon the history of the statute, or grounded upon convenience, or grounded upon the policy of the later Act of August 9, 1916, this Court said:

"We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily prevent a recovery of the full actual loss, and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule. But the question is how the contract operates upon this case. In this case it does prevent a recovery of the *full actual loss*, if it is enforced. The rule of the common law is not an arbitrary fiat but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions, which have been made and are not in question here. It seems to us, therefore, that the decision below was right, and as, in our opinion, the conclusion is required by the statute, *neither the convenience of the clause, nor any argument based upon the history of the statute or upon the policy of the later act of August 9, 1916, Ch. 301, 39 Stat., 441, can prevail against what we understand to be the meaning of the words.* Those words seem not only to indicate a *broad general purpose*, but to apply *specifically* to this very case."

253 U. S., 99, 100.

Indeed, this Court had previously ruled that the *legal* conditions and limitations in a carrier's bill of lading duly filed with the Interstate Commerce Commission, are binding until changed by that body, but not so of conditions and limitations contained in such bill of lading which are illegal, and consequently void.

Boston & Maine R. R. v. Piper, 246 U. S., 439-445.

From all the above, we respectfully submit that it is perfectly clear that the Cummins Amendment of March 4, 1915, was passed for the *purpose* of preventing, and the clear and ex-

plicit language of this Act of Congress *absolutely prevents* a carrier or transportation company, like the Express Company, from being able to escape liability for *full actual value* and damages in a case where it has "received property for transportation" from a point in the United States to a point in an adjacent foreign country, and the loss or damage to the shipment has been "caused by it" (the carrier), or any carrier to whom the shipment was delivered.

Rates Based on Value.

Our adversaries insist that the District Judge was in error when he expressed the view that under a proper construction of the Cummins Amendment of March 4, 1915, in unmodified form, it was not permissible for the carrier to have rates based on value where the property shipped was not concealed by wrapping or boxing—a construction of the Cummins Amendment which our adversaries say the Court of Appeals in this case assumed, for the argument only, to be an inaccurate construction.

Our adversaries say in this connection:

"No reasonable tariff can be conceived of, and no reasonable classification can be imagined without considering value as an element; and in this record it appears a 'race' horse that cannot 'race' when developed, is worth no more than an 'ordinary' horse. (Trans. p. 21.) Many race horses are worth a fortune—'Man O'War,' 'Zev,' 'In Memoriam,' 'Papyrus' and others. In the case at bar the shipper values one of his horses at \$25,000, and another at \$2,000, and both are in the same shipment. (Trans. p. 20.) A 'flat' rate for all race horses would compel the carrier to charge and the shipper to pay the same rate for a horse worth \$500 and one worth \$500,000.

"The Commerce Commission, after a full hearing and consideration said:

"The right of the carrier to initiate its rates and to consider value of the property tendered for transportation as an element in determining the classification thereof or the rate applicable thereto has not been denied by the act or withdrawn by this amendment."

In re Cummins Amendment, 33 I. C. C., Rep. 682.

"Moreover, the Trial Judge's holding is rested upon a construction of a *proviso* to an Act regulating the kind of a contract a carrier may make with a shipper; and assumes Congress has departed from a practice as old as rate making itself in a *proviso* to an Act not even dealing with the subject of rate making."

(Brief and Argument for Plaintiff in Error, pp. 31-32.)

In answer to the above contention that no reasonable tariff or classification for the transportation of freight can be imagined without considering value as an element, because race horses, for instance, may be so valuable and so varying in value,—we submit that such an idea is unsound. Human lives have great money value, and vary greatly in their money value—and yet tariffs fix level passenger rates for the transportation of all passengers. And we have hereinbefore shown just what were the practices and devices of the carriers that constrained the Congress, as shown in its proceedings, to pass the Cummins Amendment of March 4, 1915, in the terms in which it was enacted.

(*Ante*, p. 35.)

And in answer to the above quoted fragment from the report of the Interstate Commerce Commission, *In Re Cummins Amendment*, 33 I. C. C. Rep., 682, we merely say this is the same report of the Interstate Commerce Commission which this Court has held to be erroneous in certain respects, and not binding, of course, upon this Court in passing upon the question of the "meaning of a statute," which was the identical statute in question. *Chicago etc., Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S., 97, 99.

But it is due the Interstate Commerce Commission to note that in the extract from its same report (33 I. C. C., Rep., 682), quoted on page 28 of our adversaries' Brief, the Commission said it was "perfectly plain," that it was the purpose of the Cummins Amendment to "invalidate all limitations" upon the carriers *liability*, except as "otherwise provided therein."

What the District Judge said in the case at bar in regard to the right of the carrier or transportation company to charge rates based on value, after the passage of the Cummins Amendment of March 4, 1915, was the following:

"I am very much inclined—although it is not necessary for me to determine that—I am very much inclined to think I was in error in the first trial of this case when I expressed the opinion that it was proper, after the passage of the Cummins Amendment, to have different rates based on value, the practice followed by the Interstate Commerce Commission in establishing rates based on graded value. I am very strongly inclined to think that that Cummins Amendment intended to stop that entirely, and intended to make the carrier liable for the full value and that necessarily would take away rates based on values, where the whole consideration for the lower rate was that there was to be a reduced liability. If the liability was to remain the full value, I don't think there would be a different rate for that special classification.

"Articles might be classed under different tariffs; and I take it different kinds of animals could be classified, draft horses, race horses, brood mares, stallions, etc.—I don't know what the reasonable classification would be—passed on by the Interstate Commerce Commission. I do not think the Amendment intended to deprive the carrier of the right to fix proper rates, based on classification, etc., except in so far as that classification was based upon the actual value of specific, individual things shipped, which was no longer to be permitted in my judgment.

"That conclusion is in accordance with the various decisions.

(Citing same.)"

(Trans., pp. 38, 39.)

And the District Judge upon the same subject, when he later ruled on the Express Company's motion for a directed verdict, said:

"The motion last made by the defendant for a directed verdict must be overruled. I see no reason to change my conclusion as to the effect of the Cummins Amendment. And in addition to what I have heretofore said on that point, I overlooked saying that in support of the view that after the adoption of the Cummins Amendment and before the amendment of 1916, there could not be rates based merely upon values, it appears that such an amendment to the Cummins Amendment was actually suggested, and was recommended by the Senate Committee on Interstate Commerce; which recommended an amendment, before the Cummins Amendment was finally passed, which incorporated words giving the Interstate Commerce Commission power to establish rates varying with the value agreed upon, which amend-

ment was not adopted; thus indicating positively, it seems to me, the intention of Congress that such rates should not be permitted under the Cummins Amendment as it was adopted—almost an irresistible inference to that effect from the action of Congress itself.” (Trans., p. 39.)

We respectfully submit that the above-quoted views of the District Judge in regard to the right of the carrier to establish rates based upon value as declared by the shipper, while the Cummins Amendment of March 4, 1915, was in effect in unmodified form, are manifestly correct in view of the plain language of said Amendment, and particularly of the language of the *proviso* thereto declaring (as the only case in which such practice would be permissible) that if the goods were hidden from view by wrapping, boxing or other means, and the carrier is not notified as to the character of the goods,

“the carrier may require the shipper to specifically state in writing the value of the goods . . . *in which case* the Interstate Commerce Commission may establish and maintain rates for transportation dependent upon the value of the property shipped, as *specifically stated in writing by the shipper.*” (Italics ours.)

(Post, pp. 71, 72.)

The District Judge was also correct in stating that the Senate Committee on Interstate Commerce recommended an amendment before the Cummins Amendment was finally passed, which amendment would have incorporated words giving the Interstate Commerce Commission power to establish rates varying with the value agreed upon, which recommendation was not adopted—thus indicating positively, as the District Judge thought, the intention of Congress that such rates should not be permitted under the Cummins Amendment as it was adopted. For convenience of the Court we quote the following from the report of the Senate Committee on Interstate Commerce referred to:

“There are some commodities which from their very nature the value of them can not be known to the carrier, and is peculiarly within the knowledge of the shipper. The carrier is compelled to rely upon the representations as to value made by the shipper. We have, therefore, recommended the adoption of an amendment providing that where the Interstate Commerce Commission has already authorized rates based upon value as represented by the shipper, or

where the Commission shall hereafter do so, the liability for loss or damage caused by the carrier shall be limited to the value as thus represented."

Report No. 407 in respect of Senate Bill No. 4522; 63d Cong., 2nd Session.

Said proposed amendment was voted down and the *proviso* in question was adopted instead, in the language in which said proviso was finally incorporated in the Act, upon motion of Senator Reed of Missouri.

Cong. Record; Senate, 63d Cong., 2nd Session., Vol. LI, June 4, 1914, p. 9783.

As showing that the District Judge was correct in his view that the rejection by the Senate of the proposed amendment (contained in the report of the Senate Committee on Interstate Commerce) to the Cummins Amendment (as introduced) allowing rates to be based on value in respect of certain commodities "which from their nature the value of them cannot be known to the carrier and is peculiarly within the knowledge of the shipper," was deliberately intended to prevent the making of rates based on value as declared by the shipper (when the goods were not concealed from view), and that this was intended to be accomplished as to all commodities not concealed, including race horses—we quote the following from the debate in the Senate preceding the action of the Senate in striking out the proposed Committee amendment and adopting in lieu thereof the language of the proviso as proposed by Senator Reed, as same became finally incorporated in the Act:

"MR. CUMMINS: I want to reply, however, to the Senator from Missouri. The subcommittee has given this matter a great deal of thought; we had long hearings upon the subject. The very thing that the Senator from Missouri thinks might be done, or ought to be done, I think is provided for here. The Interstate Commerce Commission is given authority to take *certain things* out of the prohibition of the statute if it grants express authority to make a rate based on value declared in writing. That is just what is done.

"Let me suggest why that is necessary. Take a Kentucky race horse worth \$25,000 which is delivered to the railroad company for shipment. The railroad company will not take the horse for anything like a reasonable or payable rate

unless there is an agreement with regard to the amount of recovery. If the railroad company is held to be the insurer of that animal to the extent of \$25,000, the rate becomes so high that shipment becomes impossible, and we must allow in such cases, if the Interstate Commerce Commission authorizes it, a recovery based upon declared value in order to secure a transportation rate that the shipper can pay and still accomplish his purpose.

"I think if the Senator from Missouri will look further into the particular part of the amendment he is considering he will find that the very thing that he wants to accomplish is accomplished by the amendment."

Cong. Record, Senate, 63d Cong., 2nd Session, June 2, 1914, p. 9624.

It was *after the above* that the Senate took its action rejecting the proposed Committee amendment and adopting the language of the *proviso* in question as it finally became incorporated in the Act.

We have already herein referred to the proceedings in the Senate, demonstrating that the Cummins Amendment of March 4, 1915, was intended to prevent the carrier from doing the very thing sought to be accomplished by the Express Company in the instant case.

(*Ante*, p. 35.)

What the Court of Appeals of the Sixth Circuit in the instant case said upon the subject under discussion is contained in the third foot-note to its opinion, as follows:

"We have assumed, for the purposes only of this opinion, but without so deciding, that it was competent for defendant to make varying rates for carriage, dependent upon the value of the shipment so long as no attempt was made to *limit liability below the actual loss, damage or injury suffered.*" (Trans., p. 50.)

But, of course, there is no rate question involved in the instant controversy; and the effect of the language of the *proviso* in question as contained in the Cummins Amendment of March 4, 1915, in allowing rates based upon value in cases where the goods are hidden from view by wrapping, boxing or other means, is immaterial in the instant case. What the

Court of Appeals said on this subject, as contained in the second foot-note to its opinion, is manifestly correct:

"The amendment contained a proviso permitting the carrier to require the shipper specifically to state the value of the goods when hidden from view by wrapping, boxing or other means, and relieving the carrier from liability beyond the amount so stated. But this proviso has, of course, no relation to the case under consideration."
(Trans., p. 50.)

And the fact that the later Act of Congress, of August 9, 1916, Ch. 301, 39 Stat., 441 (hereinbefore quoted—(Ante, pp. 28, 29)—was passed, giving to the Interstate Commerce Commission power to allow rates to be based on value in cases where the goods were not hidden from view—emphasizes, we submit, the correctness of the view of the District Judge below. This Act of August 9, 1916, was the Act before this Court for construction in the recent case of *American Railway Express Co. v Lindenburg*, 260 U. S., 584, 67 L. Ed. 227.

It will be noted that the Court of Appeals in the instant case, as we have before shown, assumed for the purpose of its opinion, but without so deciding that it was competent for defendant to make varying rates for carriage dependent upon the value of the shipment—"so long as no attempt was made to limit liability below the actual loss, damage or injury suffered." (Trans., p. 50.)

We submit, of course, that it is immaterial in the instant case whether the view of the District Judge or the view of the Circuit Court of Appeals in respect of the above matter is the correct view; and this is demonstrated by the fact that neither Court found it necessary to decide, and expressly left undecided, this question. Really these two views are not necessarily inconsistent.

That the view of the District Judge to the effect that under the Cummins Amendment of March 4, 1915, it would not be permissible for the carrier to make rates varying with the value of the property shipped, except when same was concealed from view by wrapping or boxing was correct; and that it was the plain purpose of the Cummins Amendment of March 4, 1915, unconditionally to impose upon carriers liability for full actual loss

caused by the carrier, except where the goods were hidden from view by wrapping or boxing, and the carrier was not notified as to the character of the goods—appears from the Report of the Senate Committee on Interstate Commerce recommending for passage the Amendatory Act of August 9, 1916, which gave to the Interstate Commerce Commission power to permit rates based on value, except as to "ordinary livestock." We quote the following from said Report of the Senate Committee on Interstate Commerce, recommending for passage said Amendatory Act of August 9, 1916:

"The proposed legislation is an amendment of the Act of March 4, 1915, commonly called the Cummins Amendment. That Amendment was *designed to impose upon carriers liability for full actual loss, damage, or injury, to property transported notwithstanding any limitation of liability or recovery or representation or agreement as to value.* The Cummins Amendment as reported by this committee contained a proviso making certain exceptions in its application. The proviso reported by the committee was *stricken out* on the floor of the Senate and another substituted in its stead and in that form became a law."

"The bill herewith reported has nothing whatever to do with rates on transportation; that is to say, it does not prescribe the compensation which carriers may charge for service. It *re-enacts* the Cummins Amendment with the *modifications* above suggested. Its purpose is to restore the law of *full liability* as it existed prior to the Carmack Amendment of 1906, so that when property is lost or damaged in the course of transportation under such circumstances as to make the carrier liable recovery is had for full value or on the basis of full value. From this general rule there is excepted, first, baggage carried on passenger trains. This is done for obvious reasons. Second, other property except ordinary live stock, with respect to which the Interstate Commerce Commission has fixed or authorized affirmatively a rate dependent upon value, either an agreed or a released value. When the commission has fixed or authorized such a rate the value agreed upon or released and necessarily stated by the shipper is not to be held as a representation of value under Section 10 of the Interstate Commerce Act. With respect to ordinary live stock as defined in the bill *there can be no rate dependent either upon agreed or released value*, and in the event of loss or damage the carrier must respond for the *actual value of the property*. The carrier will be permitted to make such a rate on ordinary live stock as will compensate for the service, including liability,

but the rate can not vary according to the value of each animal that may be loaded into a car. There will remain the right on the part of the carrier to classify different kinds of animals within the definition of ordinary live stock, but when so classified there can be no lawful variance in rates because one carload of such animals may be more valuable than another.

"The committee thinks it proper to say that in the preparation of the amendment to S. 3069 it has had the benefit of the advice of a member of the Interstate Commerce Commission and that the recommendation of the commission has been adopted."

Senate "Report No. 394," 64th Cong. 1st Sess., April 27, 1916.

In view of all the above we say it is clear, as we view the matter, that the District Judge was correct in expressing the view in the instant case that the Cummins Amendment of March 4, 1915 did not permit varying rates dependent on the value declared by the shipper as compared with the actual value, *except* when the property was concealed by boxing or wrapping and its nature was not disclosed by the shipper to the carrier.

The Very Language of the Cummins Amendment of March 4, 1915, Answers Every Contention of Plaintiff in Error in This Case.

We have hereinafter, for the convenience of the Court, set out the Cummins Amendment of March 4, 1915, in full (*Post*, pp. 70-72). We have endeavored to show the purposes for which this Act of Congress was passed, and the abuses which it sought to correct; and we have shown, we submit, that Congress understood, and the Courts have recognized, that this amendment was passed to obviate the state of the law resulting from the construction given by this Court in the *Croninger* case (226 U. S., 491), to the Carmack Amendment; and was passed for the purpose of *cutting in behind* all questions like those sought to be made by our adversaries in the case at bar.

It will be noted, in the first place, that the Cummins Amendment of March 4, 1915, is leveled against any common carrier,

railroad or transportation company subject to the provisions of the Act—"receiving property for transportation" in interstate movements, or from any point in the United States to a point in an adjacent foreign country.

The Express Company in the case at bar admittedly "received"—indeed, it is stipulated that it "received" Mr. Darden's five race horses for transportation from Latonia, Ky., to Windsor, Canada. (Trans., p. 35.)

Said Cummins Amendment next provides that any such common carrier or transportation company "receiving property for transportation" in the cases specified in the Act, shall issue a receipt or bill of lading therefor; and then the Act declares that such carrier "shall be liable to the lawful holder thereof for any loss, damage or injury to such property, caused by it"—or any connecting carrier to which it is delivered.

Admittedly in the case at bar the destruction of plaintiff's five race horses was caused by the *negligence* of the Express Company and its agent, the transporting Railway Company to which these horses were delivered in their through movement from Latonia, Ky., to Windsor, Canada.

And after declaring liability as set out above (and in substantially the same language employed in the Carmack Amendment), the Cummins Amendment goes far beyond the Carmack Amendment, by declaring that

"no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier . . . from the liability hereby imposed."

And then, lest the intent of Congress might still not be perfectly plain, the Cummins Amendment, proceeds to declare that any such common carrier so receiving such property for such transportation—

"shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the *full actual loss, damage, or injury* to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be

delivered or over whose line or lines such property may pass."

And lest it still might not be plain, the Amendment then declared that such liability for "full, actual loss," etc., should exist—

"notwithstanding any *limitation of liability or limitation of the amount of recovery or representation or agreement as to value* in any such receipt or bill of lading or in *any contract*, rule, regulation, or in *any tariff* filed with the Interstate Commerce Commission; and any such limitation, *without respect to the manner or form in which it is sought to be made*, is hereby declared to be unlawful and void."

The above explicit language of the Cummins Amendment, of course, answers every contention of our adversaries in the case at bar, we submit. It expressly and pointedly answers all their contentions in regard to the "contract" of shipment, by declaring full liability against the Express Company which "received" these horses for transportation, "notwithstanding" the terms and provisions of any "contract." And this full liability is declared notwithstanding the contents or provisions of any "tariff." And this full liability is declared notwithstanding "any limitation of liability," or any "limitation of the amount of recovery," or any "representaton or agreement as to value," in any "contract," rule, regulation, or in "any tariff filed with the Interstate Commerce Commission"; and the Act then declares that any such limitation "without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void."

What our adversaries do with a *seriousness* and a *temerity* which has always been *strange* to us, is to present insisencies in this case, and review and present numerous cases decided by this Court, without ever analyzing or noticing the plain and explicit terms and the specific provisions of the Cummins Amendment of March 4, 1915 passed after said decisions were rendered.

Confusion and Inconsistencies in the Brief of the Express Company.

With all deference to our learned adversaries it seems to us that in their brief filed in behalf of the Express Company in this case they have presented the questions they endeavor to make as though the Cummins Amendment of March 4, 1915, had not been passed at all, while they cite cases and urge reasons wholly inapplicable under this amendment; and what our adversaries undertake to say in their learned brief *in regard* to the Cummins Amendment of March 4, 1915, seems to us to be very much confused and very inconsistent—though we make this statement with all due deference to them.

The trouble with our adversaries is that they never descend *at all* to any express and pointed *notice* or *analysis* of the express provisions of the Cummins Amendment of March 4, 1915.

For instance, in speaking of the Carmack and the Cummins Amendments our adversaries make a fundamental statement and cite authorities which do *not* sustain it, as follows:

“Neither the Carmack nor the Cummins Amendment *creates* anything; both are negative, and merely *prohibit* a *contractual* change of common law liability—one as to *distance*, and the other as to *amount*.”

(Brief and Argument for Plaintiff in Error, p. 13.)

It would seem from the above that our adversaries insist that the Cummins Amendment of March 4, 1915, creates nothing, and merely prohibits a “contractual” change of common law liability; and this same fundamental misconception is repeated by our adversaries much later in their brief, in the following words:

“It is submitted the first Cummins Amendment merely means: ‘Hereafter it shall not be lawful for a carrier to limit by contract the amount of its common law liability in the event of liability, except where the property transported is hidden from view by boxing, wrapping, or otherwise, and the carrier is not informed of its character.’”

(Brief and Argument for Plaintiff in Error, p. 28.)

The Cummins Amendment of March 4, 1915, of course, in plain words, declares that the carrier “shall be liable” for “*any* loss, damage or injury” to the property shipped, “caused by it.”

Here is a direct imposition by statute upon the carrier of full liability. provided it appears that the injury was due to negligence i. e., "was caused by it."

And then this statute expressly declares that—

"no contract, receipt, rule, regulation or other limitation of any character whatsoever shall exempt such carrier or transportation company from the liability hereby imposed."

The above language is, of course, inconsistent with our adversaries' view (which is apparently their *fundamental* misconception) that said Cummins Amendment merely undertakes to make it unlawful for a carrier to limit "by contract" its full liability for damages caused by it, and does not undertake affirmatively to impose any liability at all.

And said Cummins Amendment, if possible, makes the *imposition* of such full liability still more pointed by later repeating that the carrier—

"shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage or injury to such property . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the *manner* or *form* in which it is sought to be made is hereby declared to be *unlawful* and *void*"; etc.

We admit we do not understand adversary counsel when they insist that said Cummins' Amendment merely forbids the carrier to limit by "express contract" the amount of its full liability for all damages, due to the injury "caused by it."

At another place in their brief our adversaries say—

"Obviously, if an amendment" (the Cummins Amendment) "to the Commerce Act has fastened upon the carrier absolute liability, regardless of any conduct of the shipper, even though in violation of other provisions of the Commerce Act, the action of the Trial Judge was correct, and no further defenses were permissible."

(Brief and Argument for Plaintiff in Error, p. 21.)

The effect of the Cummins Amendment of March 4, 1915, was not to impose "absolute liability" on the carrier at all, but its effect and its plain declaration is to impose such absolute liability for the *full loss* if it appears that the injury was due to the carrier's *negligence*, that is—"caused by it."

And again in the brief filed on behalf of the Express Company we find the following statement:

"The sole purpose of the legislation appears to have been to prevent the carrier limiting by contract the *amount* of its common law liability in the event of liability."

(Brief and Argument of Plaintiff in Error, p. 26.)

The above again manifests the erroneous insistence made by the Express Company that the Cummins' Amendment of March 4, 1915, was merely aimed at preventing the carrier from limiting "by contract" the amount of its common law liability, in the event of liability. The plain words of the Act forbid any such limitation—"without respect to the *manner* or *form* in which it is *sought* to be made"; and all such limitations are expressly "declared to be unlawful and void."

And again there appears in the brief for the Express Company the following statement—

"In this case the shipper is not seeking to *enforce* the *shipping contract* as made, and upon which this suit is *necessarily grounded*, but says he is *not bound* by the shipping contract, which states the value of the shipment and upon which the rate was adjusted—all in conformity with the filed and published tariffs,— but insists he may prove *aliunde* the contract a vastly different value, and for the purpose of increasing the amount of damage."

(Brief and Argument for Plaintiff in Error, p. 35.)

And later on in the brief of the Express Company there appears a similar statement, in the following language:

"In the case at bar the shipping contract (Trans. p. 22), *required by the Carmack and the Cummins Amendments*, and its terms prescribed by the Commerce Commission and made a part of the *filed tariffs*, not only requires the shipper to disclose the actual value of the shipment, but it also states the rate, to-wit: one per cent of value above the minimum value of the shipment."

(Brief and Argument of Plaintiff in Error, p. 41.)

The above quotations disclose that our adversaries think that the *gravamen* of this suit is the breach of a "shipping contract," which the Cummins Amendment "required" to be made. The truth is that in the instant case (as pointed out in the opinion of the Court of Appeals) "plaintiff planted its right to recover not on defendant's liability as an *insurer*, but on its *positive* and *proximate negligence* largely in making the shipment in question in a wholly unfit car." And the Cummins Amendment as a condition to the plaintiff's right of recovery of his full actual loss, *does not* "require" any written "shipping contract" to be made; but on the other hand while said statute (as did the Carmack Amendment) directs that the carrier when it receives the property for transportation "shall issue a receipt or bill of lading therefor," nevertheless declares such full liability when the property has been received for transportation and the injury thereto has been "caused by it" (the carrier) "whether such receipt or bill of lading has been issued or not"; and also declares such full liability "*notwithstanding*" any "contract" or any agreement or representation as to value, or the terms and provisions of any "tariff," etc.

As before stated, it seems to us that the *whole trouble* with our adversaries is that they have never descended to any express and pointed analysis or consideration of the very terms and provisions of the Cummins Amendment of March 4, 1915, with the result that their learned Brief is beyond our limited powers of understanding—while the numerous decisions of this Court cited therein were decided prior to the passage of the Cummins Amendment of March 4, 1915, which was intended to meet and change the state of the law as it existed under such decisions.

Assignment of Errors Analyzed.

I. Our adversaries' Assignment of Error I, (*Ante.*, p. 22), challenges the action of the Circuit Court of Appeals in refusing to reverse the District Judge below for overruling the Express Company's motion, made at the conclusion of the testimony of plaintiff below, to have the Court withdraw and exclude from the jury all the evidence relating to and showing the *actual value* of the horses killed, on the ground that such evidence tends to vary the terms of the "written contract of shipment introduced

by the plaintiff as evidence in this case"; and also tends to vary the written terms of the contract prescribed in the filed and published tariffs under which the shipment was made.

The obvious answer to the above assignment is that there was no written contract of shipment, and that the undisputed facts established that the Express Company's agent (Fenfrock) fraudulently, and without the knowledge and consent of Mr. Darden or anyone representing him, undertook to "fix up" the alleged contract with the stated value of \$100 each for the horses, and had same signed by a man known by this agent not to represent Mr. Darden, and who told the agent he was not undertaking to represent Mr. Darden, and even this outside man did not undertake to give any information to the Express Company's agent about the value of the horses. (Trans., pp. 19, 21, 22; 33-35.)

Another obvious answer to this assignment is that plaintiff did not introduce in evidence this alleged "written contract of shipment" for the purpose of grounding any rights thereon. This contract was never turned over to plaintiff, or any one representing him, and was never seen by plaintiff until it was introduced by defendant and marked as "Defendant's Exhibit No. 2" on the first trial below (Trans. p. 22); and said alleged "contract of shipment" which thus came to plaintiff's knowledge and access, was merely marked as "Plaintiff's Exhibit No. 2" on the last trial below for the purpose of showing same to plaintiff's witnesses and having them *disclaim* any knowledge of its contents, or that same was ever turned over to plaintiff or anyone acting for him.

Plaintiff's suit was to no degree grounded upon this written contract. Neither the original nor the amended declaration mentioned or referred to this pretended written contract at all.
(Trans. pp. 1-5; 6-11.)

Plaintiff's said declarations alleged that defendant agreed to furnish and provide for this shipment of horses a first-class, two-door steel or palace horse car; and set out the rate or price which the Express Company agreed to receive for the shipment; and then set out how the Express Company, after receiving said horses for transportation, *negligently* had same loaded in an old, rotten and defective car, which it negligently handled by

having same placed next behind the drawing locomotive, and at the head of the train, with a long and heavy steel train coupled behind it, contrary to the usages and practices of good rail-roading. (Trans. pp. 1-5; 6-11.)

Plaintiff's suit was grounded upon the *underlying charge of negligence*, by which his horses were destroyed by the Express Company, after they had been "received for transportation" as defined in the Cummins Amendment of March 4, 1915.

Another obvious answer to the foregoing assignment is that by the express terms of the Cummins Amendment there did not exist any authority in the Interstate Commerce Commission, or in the Express Company, to establish any rate on these horses based on stated or declared value, since these horses were not "hidden from view," and it was not a case where the carrier was "not notified as to the character of the goods." The first proviso of the Cummins Amendment expressly declares that it is only in such cases that the carrier may require the shipper to state in writing the value of the goods, so as to limit the carrier's liability to the amount so specifically stated; and even in such case the Interstate Commerce Commission is only authorized to establish rates dependent upon value—"specifically stated in writing by the shipper."

And a *conclusive* answer to the foregoing Assignment of course, in this case—(where it is admitted that the Express Company "received" the horses for transportation from a point in Kentucky to a point in Canada, and that they were killed as the result of the *negligence* of the Express Company)—is that the Cummins Amendment declares and imposes liability for the "full actual loss, damage or injury" to such property, *notwithstanding* any limitation of liability or limitation of the amount of recovery, or representation or agreement as to value . . . in any *contract* . . . or in any *tariff* filed with the Interstate Commerce Commission." (*Post*, pp. 70-72.)

Any contention that in this sort of a case the shipper should not be allowed to prove the *actual value* of his property negligently destroyed by the carrier, is one that answers itself, in view of the terms of the Cummins Amendment.

II. Assignment of Error II—(*Ante*, p. 22)—challenges the action of the Circuit Court of Appeals in refusing to reverse the District Court for overruling the Express Company's motion made at the conclusion of the evidence in the District Court, to have the Court withdraw and exclude from the jury all evidence offered by plaintiff tending to show any agreement or understanding on the part of the Express Company to furnish any particular kind of car on any particular date, upon the ground that such evidence tended to vary the terms and provisions of the *published tariffs* filed with the Interstate Commerce Commission.

The evidence mentioned in the foregoing Assignment was given by the plaintiff Darden, in person, who never saw, signed, or knew anything about any alleged written contract of shipment; and this evidence was offered and allowed for the purpose of establishing that the Express Company "received" the horses for transportation from a point in Kentucky to a point in Canada, so as to bring the case under the terms of the Cummins Amendment; and such testimony was also "pertinent to the question of *negligence*" as pointed out in the opinion of the Circuit Court of Appeals (*Trans.* p. 53). The plaintiff below did not rely upon the breach of any contract to furnish a particular kind of car on a particular date for his remedy, but, on the other hand, proceeded to show the *negligent destruction* of his horses by the Express Company, and this negligence is now not denied.

And, of course, a further conclusive answer to the foregoing Assignment is that the Cummins Amendment declares full liability in this sort of a case—(where it stands established against the Express Company that the shipper's loss was "caused by it")—*notwithstanding* any attempted limitation of liability "or representation or agreement as to value in any contract" or "in any tariff," and declares that any such limitation "without respect to the manner or form in which it is sought to be made" shall be "unlawful and void." (*Post*, p. 71.)

III. Assignment of Error III—(*Ante*, p. 22)—challenges the action of the Circuit Court of Appeals in refusing to reverse the District Judge for overruling the Express Company's motion, made at the conclusion of all the evidence, which was but a

renewal of its motion made at the conclusion of plaintiff's testimony, to have the Court dismiss plaintiff's suit upon the alleged ground that plaintiff, by his own testimony, had disclosed to the Court the illegality "in the contract upon which his suit was based," in that it appeared that plaintiff shipped his horses "on a valuation which was less than actual value," contrary to the filed and published *tariffs* governing the shipment.

A conclusive answer, we submit, to the foregoing Assignment is that plaintiff's suit against the Express Company was foundationed not upon an alleged written contract of shipment, which plaintiff knew nothing about, but the *gravamen* of plaintiff's suit was the "receipt" by the Express Company of these horses for transportation from a point in Kentucky to a point in Canada, and their later destruction "caused by it" (the Express Company) as the result of its now established and admitted *negligence*; and the Cummins Amendment, in this sort of a case declares liability on the part of the carrier for the "full actual loss" regardless of any "contract" or any "representation" as to value, or "any tariff filed with the Interstate Commerce Commission."

(*Post*, p. 71.)

Another obvious answer to the above Assignment is that this case presents logically no question of the enforcement of any "illegal contract" for the shipper's benefit. The only question presented is the "other way round"—that is, can an "illegal" contract or limitation upon value (expressly declared to be "unlawful and void" by the Act of Congress) be invoked by the Express Company to prevent the shipper from recovering his "full actual loss, damage or injury," when said Cummins Amendment of March 4, 1915, expressly gives the shipper this remedy "notwithstanding" any such contract or representation as to value, or attempted limitation of liability "without respect to the manner or form in which it is sought to be made."

IV. Assignment of Error IV.—(*Ante*, p. 23) challenges the action of the Circuit Court of Appeals in refusing to reverse the District Judge for denying plaintiff's motion made at the conclusion of all the evidence, "to direct the jury to return a verdict for the defendant," because: (a) the plaintiff disclosed by his own testimony the illegality of the contract upon which his

suit is based, in that it appeared that the horses were shipped on a valuation which was less than actual value, and this resulted in a *rebate*, contrary to the filed and published tariffs governing the shipment; and (b) because it appeared from plaintiffs' declaration and the evidence offered by plaintiff that his suit was based on an alleged *oral contract* entered into between the plaintiff and an agent of the Express Company, which oral contract was contrary to the published tariffs filed with the Interstate Commerce Commission; and (c) because the contract entered into between the plaintiff and the agent of the Express Company was in violation of the statutes of the United States, and therefore illegal and void, *in that* said contract was not in accordance with the filed and published *tariffs* such as were required by the statutes governing the transportation of interstate commerce.

One answer to the foregoing Assignment would be, of course, that if there were no Cummins Amendment, and plaintiff had actually signed a contract agreeing to a valuation of \$100.00 each for his horses, and obtained a rate based thereon, he would still have a right to recover the agreed valuation of \$100 each for said horses, and a motion to direct a verdict outright for the defendant could not have been granted at all.

Another answer to the foregoing Assignment is that plaintiff's suit was not "based" on any alleged "oral contract" nor upon the alleged "written contract of shipment"; but, on the other hand, plaintiff's suit was expressly grounded on the Cummins Amendment, which declares full liability in this sort of a case where the shipper's property was "received" by the carrier for transportation from a point in the United States to a point in an adjacent foreign country, and was then *negligently* destroyed; and which declares such full liability "notwithstanding" any limitation of liability, or limitation of the "amount of the recovery," or representation or agreement as to value in any "contract" or in any "tariff filed with the Interstate Commerce Commission", and declares that any such limitation "without respect to the manner or form in which it is sought to be made" shall be "unlawful and void."

(*Post*, p. 71.)

As to the contentions in the above Assignment that plaintiff's suit should have been dismissed because based on an alleged "oral contract" of shipment, which was not permissible under the tariffs filed with the Interstate Commerce Commission, and therefore illegal and void—it is only necessary to call your Honors' attention to the language of the Cummins Amendment making the carrier liable for full actual loss to the one to whom the carrier should have issued a written receipt or bill of lading,—“whether such receipt or bill of lading has been issued or not.”

(*Post*, p. 71.)

V. Assignment of Error V.—(*Ante*, p. 23)—challenges the action of the Circuit Court of Appeals in refusing to reverse the action of the District Court in denying the Express Company's motion for a new trial.

By the motion for a new trial the Express Company merely brought forward and preserved its rights to continue to rely upon the alleged errors of the trial judge in overruling the motions made by the Express Company in the Court below, and made the basis of the first four Assignments of Error.

It is to be observed that ground (d) under Division IV of the motion for a new trial (*Trans.*, p. 41) was not urged in the Circuit Court of Appeals, but on the other hand was omitted from the specification of error under Assignment IV in that Court. (*Trans.*, p. 43.)

The Express Company thus abandoned, after the verdict in the District Court, its contention that the evidence did not sustain the charge that plaintiff's property was negligently destroyed; and accordingly the Bill of Exceptions did not contain the evidence introduced before the District Judge and the jury upon this issue of negligence; and so the Express Company is now making no contention that the verdict of the jury against it upon the issue of negligence was not sustained by the proof. It therefore results that there is nothing in Assignment of Error V (*Ante*, p. 23) that is not covered by the previous Assignments already noticed; and besides the overruling of the motion for a new trial was at the discretion of the trial judge

and can not be assigned as error under proper practice. (Opinion of C. C. A., Trans., p. 53.)

In fact in the Circuit Court of Appeals the Express Company's sole ultimate contention was that the shipping contract was wholly void and unenforceable by plaintiff, because it involved the giving and acceptance of a rebate from defendant's usual tariff rates, in violation of the Interstate Commerce Act. That Mr. Darden's horses had been killed as the result of the negligence of the Express Company, was not challenged in that Court. As to this the opinion of the Circuit Court of Appeals states:

"In this court the conclusion that such killing was proximately due to the negligence of the Express Company is not challenged—defendant's sole ultimate contention on the merits being that the shipping contract was wholly void and unenforceable by plaintiff because it involved the giving and acceptance of a rebate from defendant's usual tariff rates, in violation of the provisions of the Interstate Commerce Act." (Trans., p. 49.)

So we submit there is no sort of merit in any of the Assignments of Error.

The Opinion of the Circuit Court of Appeals.

The opinion of the learned Circuit Court of Appeals for the Sixth Circuit in the instant case is in the record,—(Trans., pp. 48-53) ; and is also reported in 286 Fed., 61-68.

This opinion, after reciting the admitted facts, reviewing the state of the law when the Cummins Amendment of March 4, 1915, was passed, noticing and quoting the plain language of said Act of Congress, and referring to and quoting the language of this Court in *Chicago, etc. Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S., 97-100 (Trans., pp. 48-50),—then proceeds to dispose of the Express Company's contention that the mere giving and receiving of a rebate from the applicable tariff rate rendered the contract of shipment in this case void and unenforceable. (Trans., pp. 48-50.)

The Court of Appeals in this connection states that whether or not the contract of shipment is unenforceable "depends upon

the public policy of the United States in that respect, as evidenced by its statutes and the decisions of its courts"; and the Court then proceeds to review numerous decisions, and particularly reviews and quotes from the opinion of this Court in *Merchants, etc. Co. v. Ins. Co.*, 151 U. S., 368, 387, 388, opinion by Mr. Justice Jackson. (Trans., pp. 50-53.)

Preliminary to quoting from the opinion of this Court in the case last above referred to, the Court of Appeals calls attention to the fact that in the instant case the plaintiff Darden is not seeking to recover on defendant's liability as an insurer, that is, upon any breach of the carrier's contract as such; and in this connection the Court of Appeals in the instant case said:

"Moreover, in the instant case plaintiff planted its rights to recover *not* on defendant's liability as an *insurer*, but on its positive and proximate *negligence* largely in making the shipment in question in a wholly unfit car. Defendant, having accepted plaintiff's horses for transportation as a common carrier, became a bailee thereof, and cannot escape liability for its *own negligence* while in possession of the horses on the ground that the original contract of carriage was illegal. Direct authority in support of the conclusion below is not wanting." (Trans., pp. 51, 52.)

And then the Court of Appeals in the instant case quotes at length from the opinion of this Court in *Merchants, etc. Co. v. Insurance Co.*, 151 U. S., 368, as direct authority for the conclusion which had just been announced, and in this connection said:

"In *Merchants, etc. v. Insurance Co.*, 151 U. S., 368, which involved the loss by fire of cotton shipped by rail, it was sought, by proof on the trial, to show that special rates, rebates or drawbacks had been given in violation of the interstate commerce laws and regulations. It was held, on error to a State court, that there was nothing in the Interstate Commerce law which vitiates bills of lading or which by an allowance of rebates, if actually made would invalidate the contract of affreightment, or exempt the railroad company from liability on its bills of lading.

"The Court (pp. 387, 388) quoted with approval the holding of the State Supreme Court that assuming 'that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the

part of the carrier for the freight received. . . . The law makes such agreements as to rebate, etc., void but it does not make the contract of affreightment otherwise void, and we think there is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability when it made such contract in connection with that for receipt and transportation of freight. *Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight.* Such a contract as to rebate would be void . . . and could not be enforced; but we think the shipper could nevertheless recover for loss of his freight through the carrier's negligence. . . . No different construction has yet been put upon the Interstate Commerce law so far as we are advised, and we decline to give it any other.' The Supreme Court added its own express statement as follows: 'There is nothing in the Interstate Commerce law which vitiates bills of lading, or which, by reason of such allowance . . . if actually made, would invalidate the contract of affreightment or exempt the railroad company from liability on its bills of lading.' True, this decision was concerned with the original Interstate Commerce Act of 1887 (Feb. 4, 1887; 24 St. Ch. 104, pp. 379, et seq.), which did not punish the shipper for accepting or receiving rebates; but it did, in express terms, prohibit unjust discrimination in rates, declared such discrimination unlawful, required the carrier to file copies of its schedules of rates, made it unlawful for the carrier to charge, collect or receive a greater or less compensation than provided in the published schedules, and for willful violation of the act made the carrier guilty of a misdemeanor. Plainly, therefore, such rebates were then not only contrary to the public policy of the United States, but were positively illegal (see *Armour v. United States*, 209 U. S. at p. 69). That the shipper was not punishable does not alter the case in this respect.

"We are not cited to, nor have we found, any decision of the Supreme Court which, in our opinion, as applied to the facts of the instant case, contravenes or discredits the decision in the cotton compress case just cited."

(Trans., pp. 52, 53; 286 Fed., 66-68.)

The case at bar demonstrates the truth and foresight in the language of this Court in the 151 U. S. case *supra* (p. 388) where it was said that "*such a construction*" (one that would excuse a carrier from all liability when it made a contract for a rebate in

connection with a contract for receipt and transportation of freight) "*would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight.*"

The entire effort of the Express Company's agent (Fenrock) in filling out the pretended contract of shipment which Mr. Darden never saw, and knew nothing about, was the fraudulent manifestation of his principal's preference for a rebate to liability for the freight it received for transportation.

Upon the grounds upon which the learned Circuit Court of Appeals rests its opinion and holding, the same is obviously sound, we submit. But we respectfully call attention of your Honors to the language of the Cummins Amendment of March 4, 1915, wherein liability for full actual loss, damage or injury is declared—

"notwithstanding any limitation of liability or limitation of the amount of recovery, or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void."

The above language is very plain. It cannot be misunderstood or misconstrued by anyone, we respectfully submit.

So that really, we submit, any discussion as to whether or not the so-called "shipping contract" in the instant case (aside from the express provisions of the Cummins Amendment of March 4, 1915) would be void or valid, is wholly immaterial, because the plain language of said Cummins Amendment imposes upon the carrier liability for the full actual loss, damage or injury caused by it, "notwithstanding" any attempted limitation upon the amount of the recovery growing out of any agreement as to value, in any receipt or bill of lading, or in "any contract," rule, regulation, or in any "tariff filed with the Interstate Commerce Commission," etc.

In their Brief, our adversaries seem to be very much concerned about how the Congress of the United States mutilated

certain provisions of the Interstate Commerce Act by the plain language of the Cummins Amendment; and they seem to think that the original Cummins Amendment of March 4, 1915, which controls the case at bar, did not leave in force *very much* of the Act to Regulate Commerce. Even if this were true, it could not prevent the Court from administering the plain and unambiguous meaning of the provision of the Cummins Amendment declaring full liability in a case like this one.

Of course the original Cummins Amendment leaves in force all the provisions of the Interstate Commerce Act prohibiting rebates and discriminations, for which abundant civil and criminal sanctions and penalties continued to exist in the Act, notwithstanding the full liability provision of the Cummins Amendment.

Our adversaries, it seems to us, lose sight of the *simple proposition* that by the Cummins Amendment of March 4, 1915, the Congress intended to correct *abuses* and *fraudulent* and *sinister practices* by carriers and transportation companies which had been seeking to avoid their full common law liability as common carriers by smuggling into their complicated tariffs one rate which would be large, or even prohibitive, but which would leave their full liability unrestricted, while the shipper was induced to ship on a rate reasonable and compensatory to the carrier, but which had attached to it a limited liability condition or provision. All this seems very simple to us, and the reports of the Congressional committees and the debates in the Senate hereinbefore referred to are perfectly clear as to all this.

(Ante, pp. 33-36.)

Under the Cummins Amendment, the transportation company, as the learned District Judge pointed out, could have filed a tariff fixing in the first instance as high a rate as it pleased, to be applicable to the transportation of *race horses*, and could have fixed another and a lower rate, to be applicable to the transportation of *ordinary* horses. And, of course, this transportation company would have done this if it had not desired to persist in the very *sinister practice* which the Cummins Amendment was enacted to destroy, and which, *by its plain words*, it did destroy.

Our adversaries seem to be very much *obsessed* with the importance of the proposition that the so-called "Shipping Con-

tract" in this case did not attempt in so many words to limit the carrier's liability. And since this is true, our adversaries seem to think that said liability can be limited by a *legal implication* grounded on the *tariff* filed with the Interstate Commerce Commission and the previous decisions in regard to the legal effect of tariff provisions. In this connection our adversaries cite many decisions which were rendered *prior* to the passage of the Cummins Amendment, and quote the language of the Court in *Penn. R. Co. v. Coal Co.*, 230 U. S., 197, where it was said—

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike."

What do our adversaries expect this Court to do with the provision of the Cummins Amendment which declares full liability notwithstanding "any tariff," etc.?

At pages 42 *et seq.*, of their brief, our adversaries insist that in its last analysis the instant case presents for consideration and determination a question of "public policy." This we deny. The case as it stands in this Court is merely one of enforcing the Cummins Amendment of March 4, 1915 in accordance with its definite and unambiguous terms and provisions. The "public policy" of our nation as to the carrier's liability in a case like this was conclusively declared and settled by the Cummins Amendment of March 4, 1915. If its terms are to any degree inconsistent with previous Acts of Congress and the public policy manifested by such previous statutes, then, nevertheless, its terms and provisions are *clear* and *unmistakable* and previous inconsistent enactments and the public policy manifested by them would not be relevant to the instant controversy. Such was the plain declaration of this Court, speaking through Mr. Justice Holmes, in the case of *Chicago etc. Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S. 97-100, hereinbefore quoted.

(*Ante*, pp. 39, 40.)

Constitutionality of the Cummins Amendment of March 4, 1915.

We do not understand our adversaries as making any contention in this Court against the constitutionality of the Cummins

Amendment of March 4, 1915—though they did make such suggestion, and express some doubt about its constitutionality, in both their oral argument and their brief in the Court of Appeals.

Any attack upon the constitutionality of the Cummins Amendment would appear completely to be answered by the language of this Court in dealing with the Carmack Amendment in the case of *Adams Express Company v. Croninger*, 226 U. S., 491-500, where this Court said:

“That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to *regulate contracts* between the shipper and the carrier of an interstate shipment by *defining the liability* of the carrier for loss, delay, injury or damage to such property, *needs neither argument nor citation of authority.*”

226 U. S., 500.

And as we have hereinbefore pointed out, before the passage of the Carmack Amendment this Court had uniformly sustained State statutes prohibiting the making of limited liability contracts by common carriers with their shippers, and declaring liability by such carriers for the full actual value of and damages to property lost, injured or destroyed in transit.

(*Ante*, pp. 25, 33-34.)

Not only is there nothing of substance, we submit, in any suggestion of the possible unconstitutionality of the Cummins Amendment of March 4, 1915—but the liability for full actual loss or damage enacted thereby, notwithstanding any and every sort of an effort on the part of the carrier to limit its liability for damage caused by it, contains no new or strange idea at all. As stated, this Court uniformly sustained State statutes containing similar provisions and declarations, until the passage of the Carmack Amendment which amounted to legislation by Congress occupying this field as to Interstate Commerce, and so was held impliedly to repeal or invalidate such State statutes.

Conclusion.

For all the reasons hereinbefore stated, we respectfully submit that if Writ of Error be held permissible procedure to review the holding of the Circuit Court of Appeals in this case, either our motion to affirm should be granted or, in any event, the judgment and holding of the Circuit Court of Appeals should be affirmed on the merits; and if in the opinion of this Court the case be one wherein the judgment of the Court of Appeals is final, then our motion to dismiss should be sustained, and the petition for certiorari should be dismissed for lack of merit or, if granted, the holding of the Court of Appeals should, in any event, be affirmed on the merits.

Respectfully submitted,

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APPENDIX "A."

The Cummins Amendment of March 4, 1915.

The original Interstate Commerce Act of February 4, 1887, 24 Stat., 379 Ch. 104, was extensively amended by the Act of June 29, 1906, 34 Stat., 584 Ch. 3591, known as the Hepburn Law. In Section 7 of this last mentioned act of 1906 there was incorporated an amendment, known as the Carmack Amendment, to Section 20 of the original Interstate Commerce Act of 1887.

For ready reference, the Carmack Amendment can be found printed in the lower margin of the report of the case of *Adams Express Company v. Croninger*, 226 U. S., 503.

The Cummins Amendment of March 4, 1915, effective 90 days after its passage, was in the form of an Amendment to the Carmack Amendment to the Hepburn Act, and said Cummins Amendment in its *entirety* is as follows:

The Cummins Amendment.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That so much of Section 7 of an Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February 4, 1887, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29, 1906, as reads as follows, to-wit:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State, shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has

under existing law," be, and the same is hereby, amended so as to read as follows, to-wit:

"That any common carrier, railroad, or transportation company, subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates

for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided, further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided, further,* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.

"SEC. 2. That this Act shall take effect and be in force from ninety days after its passage."

"Approved March 4, 1915."

38 Stat. L., 1196, 1197.

Fed. St. Anno. Sup., 1916, pp. 124, 125.

Office Supreme Court, U. S.

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IN THE

Supreme Court of the United States

October Term, 1922.

No. 865 *226*

ADAMS EXPRESS COMPANY,

Plaintiff in Error

vs.

W. W. DARDEN,

Defendant in Error

In Error to the United States Circuit Court of Appeals
for the Sixth Circuit.

MOTIONS TO DISMISS OR AFFIRM AND SUPPORTING
BRIEF AND ARGUMENT MADE IN BEHALF OF
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IN THE
Supreme Court of the United States

October Term, 1922.

No. 865

ADAMS EXPRESS COMPANY,
Plaintiff in Error
vs.

W. W. DARDEN,
Defendant in Error

In Error to the United States Circuit Court of Appeals
for the Sixth Circuit.

**MOTIONS TO DISMISS OR AFFIRM AND SUPPORTING
BRIEF AND ARGUMENT MADE IN BEHALF OF
DEFENDANT IN ERROR W. W. DARDEN**

May It Please Your Honors:

Defendant in Error, W. W. Darden, hereby makes and submits his motions to dismiss or affirm in the above styled cause which is pending in this Court on Writ of Error to the Circuit Court of Appeals for the Sixth Circuit, upon the following grounds:

(1) The Writ of Error should be dismissed because the decree or judgment of the Circuit Court of Appeals was final, and the remedy of Plaintiff in Error, if any, is limited to an application for *certiorari*; and

(2) If Writ of Error be appropriate appellate procedure in this case, then the decree or judgment of the Circuit Court of Appeals should be affirmed, on the ground that it is manifest that said Writ was taken for delay only, or the questions on which the decision of this cause depends are so frivolous as not to need further argument.

This motion is made and submitted under Rule 6, Par. 4 of this Court.

Defendant in Error in support of the foregoing motion to dismiss or affirm, herewith submits his Brief of Argument.

Notice of this motion, with a copy of the accompanying Brief and Argument, has been served on the counsel for Plaintiff in Error, in full compliance with the rules of this Court.

Respectfully submitted,

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**BRIEF AND ARGUMENT IN SUPPORT OF THE
FOREGOING MOTION TO DISMISS OR
AFFIRM SUBMITTED IN BEHALF OF
DEFENDANT IN ERROR**

STATEMENT OF THE CASE.

May It Please Your Honors:

This case in which Defendant in Error has made a motion to dismiss or affirm, is in this Court by Writ of Error to the Circuit Court of Appeals for the Sixth Circuit.

By said Writ of Error, Plaintiff in Error, Adams Express Company, seeks to have this Court review and reverse the opinion and holding of said Circuit Court of Appeals (Circuit Judges Knappen, Denison and Donohue sitting), which affirmed the judgment of the Honorable Edward T. Sanford (now Mr. Justice Sanford of this Court) while holding the District Court of the United States for the Middle District of Tennessee, Nashville Division.

To have reviewed and reversed the above mentioned holding of the Circuit Court of Appeals of the Sixth Circuit in the instant case, Plaintiff in Error, Adams Express Company, has heretofore also filed its Petition for the Writ of Certiorari, to which this Defendant in Error has filed his full response and brief in support thereof; and this application for Certiorari has been heretofore submitted to this Court.

We will hereinafter in this Brief supporting our instant motion to dismiss, present the view that the judgment of the Circuit Court of Appeals was final in this case, and that said Writ should be dismissed for that reason.

Post, pp. 27-34.

We will also hereinafter in this Brief supporting our instant motion to affirm (in the event it should be held that the decision of the Court of Appeals was not final), endeavor to show your Honors that there is no sort of *substance* or *merit* in the contentions of Plaintiff in Error, and that said Writ

was taken for delay only, or that the questions on which the decision of this cause depends are so frivolous as not to need further argument.

Outline of Proceedings Below

Defendant in Error, W. W. Darden, who was plaintiff in the District Court below, and is hereinafter referred to by name or as plaintiff, brought this suit in the year 1915, against Plaintiff in Error, Adams Express Company, hereinafter referred to as the Express Company, or as defendant, to recover \$65,000 damages, representing the value of five thoroughbred race horses belonging to said Darden, which were negligently killed on the night of July 7, 1915, in a railroad wreck occurring about twelve or fourteen miles northeast of Cincinnati, Ohio, while said horses were being transported by said Adams Express Company from Latonia, Kentucky, to Windsor, Ontario, in the Dominion of Canada.

The original declaration of plaintiff Darden was filed against the Express Company and the Pennsylvania Railroad Company (Trans., pp. 1-5); and later, by amendment, the suit was extended so as to include the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company; and an amended declaration in the District Court below was filed against said Express Company and these two Railroad Companies. (Trans., pp. 6-11.)

Later,—it not being clear that either of said Railroad Companies had any agent residing in the Federal District in which the suit had been brought upon whom process could be served, and because the Express Company, in any event, was responsible for the negligent action of the Railroad Company, which was transporting the horses in question as the agent of said Express Company, at the time and place of the wreck and accident in question—the case in the District Court below was non-suited as to the two defendant Railroad Companies. (Trans., p. 12.)

The case was first tried below in the year 1916, before the Hon. Edward T. Sanford, then District Judge, and a jury, and resulted in a verdict for plaintiff and against the Express Company, which was set aside by the District Judge for reasons stated in a memorandum opinion filed by him. (Trans., pp. 12, 13.)

Thereafter, in November, 1921, another trial occurred before the same District Judge and a jury, and resulted in a verdict in favor of said Darden and against the Express Company for \$32,500. (Trans., p. 14.)

During the progress of this last trial in the District Court below the District Judge had occasion to rule upon certain technical motions made by the Express Company; and the opinions of the District Judge making these rulings are contained in the record. (Trans., pp. 15, 38, 39, 40.)

The Express Company duly made its motion for a new trial in the District Court below, which motion was limited to the alleged errors of the trial judge in overruling the Express Company's motions during the trial, and which motion was overruled (Trans., pp. 15, 40-42); and thereupon the Express Company sued out a Writ of Error removing the case to the United States Circuit Court of Appeals for the Sixth Circuit (Trans., pp. 45, 46); and said Court of Appeals, on January 9, 1923, speaking through Circuit Judge Knappen, handed down its learned opinion, affirming in all respects the holding and judgment of the District Court below. (Trans., pp. 48-53.)

Thereupon the Express Company sued out its Writ of Error to this Court, and had annexed to and returned with said Writ an authenticated transcript of the record, an assignment of errors and a prayer for reversal, with a citation to the adverse party; and the case in error has been regularly docketed in this Court. (Trans. 53-57.)

The Nature of the Questions Now Presented.

All the questions which the Express Company seeks to present under its Writ of Error in this Court are, we respectfully submit, without any sort of *substance* or *merit*, and are fully answered against the contentions of the Express Company by the *express* and *explicit terms* and *provisions* of the Act of Congress of March 4, 1915, known as the "Cummins Amendment" to the Act to Regulate Commerce.

By the terms of said Cummins Amendment it is expressly provided that any common carrier or transportation company "receiving property for transportation" from a point in the

United States to a point in an adjacent foreign country, shall issue a receipt or bill of lading therefor, and shall be *liable* to the lawful holder thereof, or to any party entitled to recover thereon, "whether such receipt or bill of lading has been issued or not"—"for the *full* actual loss, damage or injury to such property *caused by it*" or by any carrier to which such property may be delivered.

And said Cummins Amendment, in so many words, declares that this *certain liability* of any such transportation company shall exist—

"and **no contract, receipt, rule, regulation or other limitation of any character whatsoever* shall exempt such common carrier, railroad or transportation company from the *liability hereby imposed*;"

And said Act of Congress explicitly and in so many words provides that such transportation company shall be so liable "for the full actual loss, damage or injury to such property"—

"notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading or in any contract, rule, regulation or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void: (Post, p. 68.

For the convenience of your Honors we reprint as Appendix "A" to this Brief the Cummins Amendment of March 4, 1915, *in full.*

Post, pp. 67-69.

Another Act of Congress, sometimes referred to as the "Second Cummins Amendment" was passed on August 9, 1916, and for the convenience of the Court we hereinafter quote the provisions of this last mentioned Act (*Post, pp. 25, 26.*) This last mentioned Act, however, was not passed until more than a year after the negligent killing of the race horses of Mr. Darden in the railroad wreck which, admittedly, occurred on July 7, 1915.

It is *admittedly true* that the above mentioned Cummins Amendment of March 4, 1915, became operative ninety days

**Italics throughout this Brief are ours.*

after its passage, and consequently was in force, and had been in force for more than thirty days, at the time of the railroad wreck in which said horses were negligently killed.

That these race horses of Mr. Darden were killed as the result of the *negligence* of the Express Company and its railroad company agent, is not now denied.

In the face of the plain and explicit provisions of the Cummins Amendment of March 4, 1915, it would not to any degree interfere with Mr. Darden's right of recovery if he and the Express Company had entered into a formal written contract reciting that his horses were worth only \$100 each, and were being shipped on a rate that was based upon that understood and agreed valuation—because said Cummins Amendment of March 4, 1915, expressly declares liability for full, actual loss, damage or injury, notwithstanding any such contract or any representation as to value.

Nor would it matter if there had been a tariff on file with the Interstate Commerce Commission fixing the rate at which Mr. Darden shipped these horses, provided they were worth only \$100 each, but fixing a higher rate if the horses had been of greater value—because said Act of Congress expressly declares liability for the full, actual loss, *notwithstanding* the limitations of any tariff on file with the Interstate Commerce Commission; and said Cummins Amendment further provides, as we have seen, that “no contract, receipt, rule, regulation or other limitations of any character whatever, shall exempt such common carrier. . . . or transportation company, from the liability hereby imposed”; and said Cummins Amendment further provides, as we have seen, that “any such limitation” (of liability or amount of recovery) “without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void.”

It appeared in this case that the Express Company “received for transportation” these race horses from Mr. Darden, to be carried from Latonia, Ky. to Windsor, Ontario, without giving to Mr. Darden or any agent of his any receipt or bill of lading therefor, or without having him, or any agent purporting to represent him, sign any paper at all (Trans. pp. 16; 19; 21, 22; 33-35),—but this is immaterial to the full liability

of the Express Company enacted by the Cummins Amendment, because said Act of Congress declares such full liability to the party who would be entitled to recover upon the receipt or bill of lading (which the Act provides shall be given to the shipper) —“whether such receipt or bill of lading has been issued or not” (Post. p. 68.)

The liability for full actual loss to the shipper declared by the Cummins Amendment is against any transportation company “receiving property for transportation”; and it was finally *stipulated* in the District Court below that the Express Company actually received these race horses for transportation from Latonia, Ky. to Windsor, in Canada (Trans. p. 35).

It is true that at the first trial of this case in the District Court below, the Express Company produced and had marked as “Defendant’s Exhibit No. 2”, what *purported* to be a shipping contract, which recited that the Express Company had received “13 running horses,” of the value of \$100 each, from Mr. Darden, the shipper, for transportation from Latonia, Ky. to Windsor, Ont. Canada; and this purported contract recited that the rate “depended upon the actual value” of said animals, such value to be stated by the shipper; and it appears, from said pretended contract, that when the value of the shipment exceeded the value stated, a much higher rate than that paid by Mr. Darden would apply. The original of this alleged shipping contract accompanies the record by special order of the District Judge and the Circuit Court of Appeals below (Trans. pp. 27; 58); and this alleged shipping contract also appears in full in the printed transcript (Trans. pp. 22-27.)

Although by the plain and explicit terms of the Cummins Amendment of March 4, 1915, it would be utterly immaterial to the liability of the Express Company for the full actual loss to the shipper in this case if Mr. Darden had knowingly and deliberately signed this contract which purported to place the value of \$100 each on his horses, and recited that the rate charged was based upon this low value—nevertheless it is fair to Mr. Darden for your Honors to understand that it appeared without controversy that Mr. Darden never signed any such shipping paper or contract reciting that his horses were only worth \$100 each (Trans. pp. 16; 18-20, 21, 22).

That this alleged "contract" was nothing but the *crooked device and fraudulent thing* of the Express Company's agent (one Fenrock) who never testified at the last trial below at all, and that neither Mr. Darden nor anyone representing him or purporting to act for him knew anything about said alleged contract at all until same was presented at the first trial of this case in the District Court below and was then marked as "Defendant's Exhibit No. 2," is not denied, but on the other hand is admitted and conceded (Trans. pp. 16-22; 42).

When the plaintiff below (Darden) at the last trial was proceeding to prove the actual value of his horses negligently destroyed, the Express Company objected on the ground that the "Contract of Shipment" governed, and the Court overruled the objection (Trans. p. 20). When the witness Loudon, a colored man who was Mr. Darden's attendant in charge of these horses at the time of the wreck, was testifying, the pretended shipping contract (which had first been introduced as Defendant's Exhibit No. 2 on a former trial and had thus come to Darden's knowledge and access) was merely shown to the witness for the purpose of having him *deny* that he, as Mr. Darden's agent, ever saw said contract or assented to it, or ever made any representation that the horses therein stated to be worth only \$100 each, were worth only that sum (Trans. p. 22).

The witness Seamster who testified for plaintiff below, and whose name as "owner or duly authorized agent of the owner" appears signed to said pretended contract (Trans. p. 25) proved without contradiction that he never pretended to act, nor was he understood as acting, for Mr. Darden in any way connected with the writing up of said "contract," and that the Express Company's agent (Fenrock) understood that he (Seamster) was not acting for Mr. Darden and had nothing to do with Mr. Darden's horses, or the end of the car in which they were shipped; and that he (Seamster) did not "undertake to exercise any rights or make any representations or do anything with reference to the end of the car that Mr. Darden occupied"; and that he never made any representation, in said contract or otherwise, that Darden's horses, or any of the horses shipped in said car, were worth only \$100 each (Trans. pp. 33, 34).

And Mr. Darden (without contradiction by anyone) proved that he made no representation as to the value of his horses;

never knew of but *the one* express rate or charge he was asked to pay; never assented to said contract or the statements therein; never authorized anyone else to do so for him; never knew anything about any shipping paper or contract at all; and it appeared without contradiction that neither Mr. Darden nor anybody acting for him, or purporting to act for him, ever had any copy of this contract turned over to them, or knew anything about its purported contents, until same was introduced in the first trial of this case in the District Court below (Trans. pp. 16-21, 22; 33-35).

As stated, the Express Company's agent (one Fenrock) never testified at all at the last trial below, and his failure to testify was not explained in any sort of way; and the testimony of Mr. Darden and his witnesses to the effect that the alleged shipping contract was nothing but a fraudulent and crooked device, went unchallenged and is not denied.

On the other hand, it was expressly admitted by defendant's counsel in the court below that Mr. Darden was not guilty of any deception whatsoever. To show this we quote the following from the transcript of the record in the District Court below:

"Before the Court ruled on the defendant's motion for a directed verdict at the conclusion of all the evidence, the Court stated: 'I understand it is not insisted that there was any actual fraud or misrepresentation.' To which defendant's counsel replied: 'If your Honor please, no, not involving moral turpitude. *We don't claim there was any deception*.'" (Trans., p. 39.)

It appeared without contradiction that the Express Company's agent (Fenrock) was acquainted with Mr. Darden's race horses involved in the shipment in question, knew they were valuable race horses, was informed that they were *very valuable* race horses, and consequently knew when he wrote (without Darden's knowledge) the \$100 valuation in the pretended contract (which neither Darden nor any agent of his ever saw until the first trial below) that this was a mere fraudulent device upon the part of said Express Company's agent (Trans. pp. 17, 18, 19, 20, 22).

At an early stage of its opinion in this case the Circuit Court of Appeals reviews most of the undisputed facts of the

case relating to the manner of the receipt of these horses for transportation by the Express Company, and their shipment by said Company in the absence of Mr. Darden and after he had returned to his home in Nashville, Tennessee (Trans. pp. 48, 49.)

Plaintiff below (Darden) undertook to prove, and did prove without contradiction, his oral conversations and understandings in regard to the shipment of his horses with the Express Company's agent, one Fenrock (Trans. pp. 16-21.) Plaintiff did this merely for the purpose of showing by facts and circumstances that the Express Company "received for transportation" his race horses to be carried from a point in the United States to a point in an adjacent foreign country (as contemplated by the Cummins Amendment of March 4, 1915.) This fact was afterwards and finally stipulated to be true (Trans. p. 35.)

So the Express Company, in the Writ of Error sued out by it is now in this Court *admitting* the "receipt for transportation" (as defined in the Cummins Amendment) of plaintiff Darden's valuable race horses; *admitting* that these horses were *negligently* destroyed by it and its railroad company agent; *admitting* the application of the Cummins Amendment of March 4, 1915, in unmodified form, at the time it received this shipment and negligently destroyed these horses; and is making no question upon the justice of the size of the recovery, and presenting no question against the accuracy of the charge of the trial Judge, which was not excepted to by either party and for that reason is not included in the bill of exceptions (Trans. p. 40.)

We respectfully submit, in the light of the above showing, that it manifestly appears that the Writ of Error was sued out by the Express Company in this case for delay only, or that it presents no question that is not frivolous and unsubstantial to the last degree.

We invite a reading by this Court of the ruling of the District Judge below, in which he correctly construed, we submit, the Cummins Amendment of March 4, 1915, and said he could not "avoid the broad language of the statute." (Trans., pp. 38, 39, 40.)

The Court of Appeals of the Sixth Circuit reached the same

conclusion, and its learned opinion is in the transcript of the record. (Trans., 48-53.)

And the rulings below are in square accord with the decision of this Court in the *only case* wherein the *broad language* of said Cummins Amendment of March 4, 1915, has come before your Honors for construction and administration.

Chicago, etc. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S., 97-100.

An examination of the Assignment of Errors filed in the Circuit Court of Appeals by the Express Company and annexed to and accompanying the return of the Writ of Error, will plainly demonstrate, we submit, that every insistence of the Express Company in this case is frivolous and unsubstantial, and is entirely obviated and eliminated by the very terms and explicit provisions of the Cummins Amendment of March 4, 1915. (Trans., pp. 54-56; Post pp. 67-69.)

We feel that what we have already hereinbefore stated, in connection with the reading by your Honors of the opinions of the District Judge and the Circuit Court of Appeals below, would be sufficient, without more, to demonstrate that this motion to dismiss or affirm should be granted.

This case is of such importance to our client, however, that we feel under the duty to proceed now, at length and with greater detail, to show your Honors the lack of any sort of merit in any of the insurances which the Express Company is seeking to make in this case.

We will accordingly first proceed, for the convenience of the Court, to make a synopsis of what the limited bill of exceptions in this case shows in regard to the *undisputed evidence* introduced in the District Court below touching the application of the Cummins Amendment of March 4, 1915 to the facts in this case, which will constitute the *entire showing* made by said bill of exceptions.

The Limited and Restricted Bill of Exceptions.

The bill of exceptions reserved by the Express Company in the District Court below is a very limited and restricted one. In addition to incorporating and presenting certain certified

copies of tariffs and express classifications on file with the Interstate Commerce Commission at the time of the receipt of this shipment of horses, the bill of exceptions only undertakes to present the evidence given by the plaintiff Darden and his witnesses in the Court below, with respect to certain conversations which occurred between said Darden and one Fenrock, the agent of the Express Company in regard to the *reception* by the Express Company of the horses for *transportation* from Latonia, Kentucky, to Windsor, Canada; to the payment of the transportation charge by said Darden to said agent of the Express Company; and in regard to the *false and fraudulent filling out*, by the Express Company's agent, of a paper referred to in the record as the "Contract of Shipment" or the "Adams Express Company Non-negotiable Live Stock Contract" purporting to have been signed by the said Darden or his duly authorized agent, but not actually so signed.

The original of this alleged "Contract of Shipment," by the special order of the District Judge, accompanies the transcript of the record in this case. This alleged contract had been marked "Defendant's Exhibit No. 2" on a former trial, and was marked "Plaintiff's Exhibit No. 2" on the last trial below, and said alleged "Contract of Shipment" appears copied in the printed record. (Trans., pp. 22-28.)

It is proper to state that Mr. Fenrock, the agent of the Express Company, did not testify at the last trial of this case in the District Court below, nor is his failure to testify explained at all; and the testimony of the plaintiff below, Mr. Darden, and his witnesses, in regard to his conversations with this agent of the Express Company, Mr. Fenrock, the receipt by the latter of the Express Company's charge for the transportation of the shipment, and the false and fraudulent filling out of this so-called "Contract of Shipment" by said agent of the Express Company without the knowledge or consent of said Darden or any one authorized to represent him, or purporting to act for him,—is all uncontradicted and constitutes all of the evidence on these subjects.

Darden, Trans., pp. 16-21.

Louden, Trans., pp. 21-33.

Seamster, Trans., pp. 31-44.

From the above cited testimony of the plaintiff below and his witnesses it was made to appear, without contradiction or dispute, as follows:

(1). About ten days before July 7, 1915, plaintiff Darden spoke to Fenrock, the agent of the Express Company, about wanting a two-door steel car in which to ship his horses from Latonia, Kentucky, to Windsor, Canada, and at this time said agent agreed to furnish such a car on July 6th; and at that time told Darden that the rate was \$165.00 for such car. (Trans., p. 17.) Darden knew this agent of the Express Company, who came out to the race track at Latonia and around the stables, and there solicited express business for his company. (Trans., p. 17.)

(2) Said agent of the Express Company (Fenrock) *knew* the horses which Darden desired to express and *knew* they were very *high-class* race horses and had won a lot lot of money and attracted the attention of the people at the race track at Latonia; and Darden told this agent of the Express Company that his horses were entered in several stake races in Canada, and he wanted to get them there in time to have them "freshened up" for these races; and then told said agent that these horses were *very valuable race horses* and that he wanted the car thoroughly cleaned and fumigated, so as to take no chances of his horses being given any disease. (Trans., pp., 16-21.)

(3) On the morning of July 6, 1915, Darden saw said agent of the Express Company (Fenrock), who then explained that he had no car that he could furnish that day, but said he would have a car on the next day, July 7. Thereupon Darden arranged with this agent that he (Darden) would have one-half of said car and "Seamster and others" the other half of the car, and that Darden would leave a check for \$82.50 for his half of the car with his trainer, Henry Louden, a colored man; and Darden then told said Fenrock that he was going back to Nashville that night and said agent agreed that he would have the car available the next day, and Darden gave him, and he took down, the names of the three attendants who were to accompany the horses in Darden's half of the car, which included Henry Louden. (Trans., pp. 17, 18.)

(4) The Express Company's agent (Fenrock) understood that Darden was only to get half the car and was only *contract-*

ing with reference to *that half* in which his six horses were to be expressed; and said agent agreed to have Darden's half of the car stalled off for his six horses; and Darden explained to the agent on this morning of July 6, 1915, that Seamster and others would take and pay for the other half of the car, and that said agent was to *collect* for this half from these other men; and an understanding was had between Darden and said agent whereby the former was to get the check of the Latonia Race Track Association for \$82.50, and leave this check with his trainer Loudon, who would go in the car in charge of Darden's six horses. After this understanding Darden left Latonia on July 6th, and did not know anything about what happened thereafter until five of his six horses which were shipped on the following day (July 7, 1915) had been killed in the wreck which occurred on the night of that day. (Trans., p. 18.)

(5) Darden never saw any paper or shipping contract; no such contract was proffered to him to sign, and he never authorized any one to sign any contract for him; and the signing of any such contract was never discussed between him and the agent of the Express Company. The only rate quoted Darden by the Express Company's agent was \$165.00 for the entire car, and \$82.50 for half of the car; and no valuation was placed by Darden on his horses, nor was he asked to fix any valuation thereon; and Darden did not know there was any other express rate by which he could ship his horses from Cincinnati, Ohio, to Windsor, Canada, except the rate the agent quoted him. Darden never heard of two express rates; the agent did not say anything to him about any valuation on his horses, nor did he name or fix any values thereon, nor did he ever authorize any one to place any values on his horses, and his trainer, Henry Loudon, a colored man, did not and would not know the value of these horses. (Trans., p. 19.)

(6) Mr. Darden's trainer, Henry Loudon, was present when the Express Company received Mr. Darden's horses on July 7, 1915, and had them loaded into the car in question. He saw Seamster, who was looking after some race horses shipped in the other half of the same car, talking with the Express Company's agent (Fenrock); and saw this agent and Seamster fixing up a contract. Loudon gave the Express Company's agent the check which Mr. Darden had left with him for his half of the car. Loudon did not sign any shipping contract, and

he never saw the alleged shipping contract in question, though he had seen similar contracts before. When the horses were loaded in the car the agent of the Express Company filled in the contract right there at the car, using a book to write on, and this contract was not presented to Louden for signature at all. The name of this witness (Louden) appearing signed to the "Attendant's Contract" which is part of the alleged contract of shipment, was not signed thereon by said Louden. The Express Company's agent (Fenrock) was doing the writing when Louden saw him and Seamster fixing up the contract. No copy of this contract was given to Louden. (Trans., pp. 21, 22.)

(7) The alleged "Contract of Shipment" had been introduced at a former trial and marked Defendant's Exhibit No. 2 (Trans., p. 22); and this paper the contents of which thus came to the knowledge of plaintiff after the wreck, was shown to the witness Louden at the last trial below, and was then marked "Plaintiff's Exhibit No. 2" (Trans., p. 22) and as stated above Mr. Darden had never seen the paper before his horses were killed, and his trainer Louden proved, as above stated, that he had not seen this paper at all, did not sign it, and that no copy of it was given to him.

(8) Seamster testified for Plaintiff below, and proved that he was interested in one horse which was among the seven shipped in the other half of the car from the half occupied by Darden's six horses,—there being thirteen horses in the car at the time of the wreck. Seamster testified that it was his signature which appeared as the bottom signature "W. Seamster" at the top of page 3 of said printed contract (Original of Plaintiff's Ex. No. 2); and that his name appearing as the top signature to the "Attendant's Contract" on page 3 of said original Exhibit, was not signed by him. Seamster did *not* give *any information* to the Express Company's agent in regard to the value of any horses in the car. He merely signed the contract at the top of page 3 thereof, because he was asked to do so by the agent, and he owned one horse in the car. Seamster did not read the contract and he was not authorized by Mr. Darden to sign it for him or as his agent; and the Express Company's agent (Fenrock) knew that he (Seamster) had charge of one-half of the car and that Darden had the other half, and knew that Seamster paid \$82.00 and something for his end of it, in which there were seven horses. There were four different persons

owning the seven horses in the half of the car that Seamster settled for with the Express Company's agent; and all Seamster undertook to do was to collect the money from the others in this half of the car and pay the agent of the Express Company for that half. Seamster *did not* "undertake to exercise *any right* or make *any representations* or *do anything* with reference to the end of the car that Mr. Darden's horses occupied"; nor did he undertake to make any payment thereof; and he told the Express Company's agent that he was merely paying for one half of the car, and to get the other half from Mr. Darden's man, Louden. (Trans., pp. 33, 34.)

(9) In regard to the statement, "13 running horses, value \$100.00" appearing written in on page 2 of the alleged contract of shipment (original of Plaintiff's Exhibit No. 2 accompanying the record; Trans., p. 24) Seamster did not write this into this contract; and while there were thirteen horses in the car Seamster was only interested in one, and had charge of two others, while three other men owned the other four, thus making up the seven horses in one-half of the car; and the plaintiff Darden owned the six horses in the half of the car which Darden settled for; and Darden never authorized Seamster to sign any contract for him; and the Express Company's agent (Fenrock) knew that Seamster was not the "agent of the the owner" of said Darden's horses, and Seamster told this agent that he would have to collect for the horses in Darden's half of the car from Darden's man, Louden. (Trans., p. 34.)

(10) It was *expressly admitted* by the Express Company in the Court below, in response to a direct question from the trial judge, that there was "*no deception*" practiced by Mr. Darden *at all*. (Trans., p. 39.)

The above is the substance of the uncontradicted testimony contained in the bill of exceptions, which was introduced in the District Court below by the plaintiff Darden and his witnesses in regard to the way and manner in which the shipment of the horses in question was *received* by the Express Company and the transportation charge paid by the plaintiff Darden as to his horses. As stated above, the Express Company's agent (Fenrock) did not testify at all, and no one testified for the Express Company in regard to any of these matters; and thus the so-called "Contract of Shipment" (original Plaintiff's Exhibit No.2

accompanying the record; Trans., pp. 22-28) appears *admittedly* to be a paper which was never signed by Mr. Darden nor any one authorized to act for him, and never seen by Mr. Darden nor any one authorized to act for him prior to the first trial of this case in the District Court below, and the valuation of the horses at \$100.00 each stated therein was a thing that neither Mr. Darden nor any one authorized to act for him ever knew anything about at all until after the horses in question were killed; and no such valuation was placed upon these horses by Mr. Darden or by any one authorized to act for him; and the Express Company's agent (Fenfrock) *knew this*, and *knew* they were "very valuable race horses," and himself *falsely* and *fraudulently* "filled in" this contract, and never gave any copy thereof to Mr. Darden nor to any one authorized to act for him; and all the above is *not denied at all* by any one for the Express Company.

In addition to the above undisputed evidence contained in the bill of exceptions, there is also contained therein a copy of the alleged "Contract of Shipment" (Trans. pp. 22-28); copies of certain published tariffs and express classifications certified by the Secretary of the Interstate Commerce Commission, filed as defendant's Exhibits No. 4 and No. 5 (Trans., pp. 27, 28),—the originals of these tariffs and classifications accompanying the record by order of the District Judge (Trans., pp. 27, 28); and a copy of the order of the Interstate Commerce Commission made on May 25, 1915, known as "Supplemental Order No. 13," which incorporates the terms and provisions of the "Uniform Express Receipt" as this was attempted to be formulated by the Interstate Commerce Commission after the passage and "in the light of the Cummins Amendment to the Act to Regulate Commerce" (Trans., p. 29); and a comparison of the so-called "Contract of Shipment" with this order of the Interstate Commerce Commission will show that same was not made out by the Express Company's agent in conformity with the said "Supplemental Order No., 13" of the Commission, which provided that the *shipper* must declare the "actual value" of each animal shipped or the "shipment must be declined." (Trans., p. 32.)

In addition to the above the bill of exceptions contains the testimony of the plaintiff below, Mr. Darden, and his witnesses showing the value of the five race horses in question which were killed by the negligence of the Express Company and its agent, the Railroad Company, and this uncontradicted testimony shows

that the horses were reasonably worth *almost double* the amount of damages which the verdict of the jury and the judgment below awarded to the plaintiff Darden. (Trans., pp. 20, 33, 34.)

The bill of exceptions also shows that plaintiff below established, and that indeed it was finally *stipulated*, that the Express Company "received" the horses in question from the plaintiff for transportation and had them loaded into the car, and routed same over the railroad upon which the wreck occurred on the through journey from Cincinnati, Ohio, to Windsor, Canada,—thus bringing the claim and suit of the plaintiff squarely and admittedly under the protection of the Cummins Amendment of March 4, 1915 (Trans., p. 35); and the bill of exceptions also shows that the jurisdiction of the Court below, upon the ground of diverse citizenship, was also made to appear, and was indeed stipulated to exist. (Trans., p. 35.)

The bill of exceptions, after setting out how the plaintiff called evidence showing the undisputed facts in regard to the circumstances under which the Express Company *received* these horses for shipment, and tending to show the negligence of the Express Company and its agents, and establishing the value of the five horses killed (Trans., pp. 17-37), and then setting out the stipulation as to the jurisdiction of the Court and the nature of the through shipment of the horses from a point in Ohio to a point in a foreign country adjoining the United States (Trans., p. 35),—then recites that the foregoing was all the evidence introduced by the plaintiff in chief on the trial in the Court below—

—"except the evidence of *numerous witnesses not included herein* who testified to facts tending to prove and establish that the wreck in question and the consequent killing of plaintiff's horses, was proximately caused by the *negligence* of defendant Adams Express Company and its agent the Railway Company, which owned the car in question and was transporting the same for the Adams Express Company at the time and place of the accident and wreck; and tending to show that said wreck *was not* caused by any act of God—i. e., the storm prevailing at the time and place of the wreck in question." (Trans., p. 35.)

The bill of exceptions next shows that at the conclusion of the evidence introduced by the plaintiff below in chief, the Express Company made certain technical motions, which were in the very *face* and *teeth* of the express provisions of the Cum-

mins Amendment of March 4, 1915, as follows: (1) to have the Court withdraw from the jury all the evidence offered by plaintiff below in regard to the value of his horses which had been negligently killed; (2) to have the Court withdraw and exclude from the jury all the evidence tending to show the circumstances under which the Express Company received for transportation and undertook to ship the horses in question, on the ground that such evidence "tends to vary the terms and provisions of the published tariffs filed with the Interstate Commerce Commission," and which governed the shipment in question; and (3) to dismiss the plaintiff's suit because it appeared that the plaintiff shipped his horses on a valuation which was less than actual value, contrary to the filed and published tariffs governing the shipment; and these motions, of course, were overruled by the learned trial judge, who naturally felt constrained to follow the plain language of the Cummins Amendment of March 4, 1915. (Trans., pp. 36-40.)

After the above mentioned motions of the Express Company had been overruled by the trial judge at the close of the testimony offered in chief by the plaintiff below, all that the bill of exceptions shows in regard to any proof introduced by the Express Company, as defendant in the Court below, in an effort to make out its defence, and by the plaintiff Darden in the Court below, in rebuttal thereof, is the following:

"Thereupon the defendant introduced proof tending to show that the wreck (which occurred about 12 miles above Cincinnati, Ohio, on the lines of the P., C., C. & St. L. Railway and *while the shipment was en route from Latonia, Kentucky, to Windsor, Canada*) and the consequent destruction of five of the six horses shipped by the plaintiff resulted from an act of God, viz.: a violent windstorm, and that no negligence of the Railway proximately contributed to the accident to, and death of plaintiff's property; and the defendant did not offer evidence upon any other question or subject; and thereupon the defendant rested its case.

"The plaintiff then introduced testimony of *experts* in rebuttal, tending to show that the wreck as a result of which the plaintiff's horses were killed *was not proximately caused or contributed to by the windstorm prevailing at the time and place thereof.*" (Trans., pp. 36, 37.)

All the above, which is the *entire showing* made by the bill of exceptions,—demonstrates, we respectfully submit, an utter

lack of any *substance or merit* in any question now sought to be made in this Court by the Express Company, which is here in the attitude of admitting its *negligence*, admitting the justice of the *quantum* of the recovery, and admitting the *application* of the Cummins Amendment of March 4, 1915, to the claim and suit of this shipper, Mr. Darden,—while said Express Company is merely endeavoring to make certain technical questions which we confess we do not understand, because they are in direct *opposition to* and in direct *contradiction of the very terms* and *provisions* of said Cummins Amendment, the constitutionality of which our learned adversaries are not attacking at all and, of course, cannot successfully attack.

No question was ever made upon the correctness of the charge delivered to the jury by the learned District Judge; and therefore said charge does not appear in the bill of exceptions. (Trans., p. 40.)

BRIEF

Propositions of Law:

We present below certain legal propositions which we submit are not open to controversy, and are controlling of all the questions sought to be presented by the Express Company by the Writ of Error sued out in this case.

(1) It was long ago well settled as a general proposition that a common carrier cannot by contract *exempt* itself from liability for loss by negligence.

York Mfg. Co. v. Illinois Central Railroad, 3 Wall., 107;
Railroad Co. v. Lockwood, 17 Wall., 357-375;
Bank of Kentucky v. Adams Express Company, 93 U. S., 174.

(2) It was later held and settled that a contract for "limited liability," when fairly made, did not contravene the settled principle of the common law preventing the carrier from contracting against liability for negligence; and the distinct ground of this holding was that where such contract for limited liability was signed by the shipper and fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, such contract would be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight received, and of protecting the carrier against extravagant and fanciful valuations.

Hart v. Pennsylvania Railroad, 112 U. S., 331, 343.

(3) The *Hart* case last above cited was followed by a long line of harmonious decisions construing limited liability contracts, both before and after the Carmack Amendment. Although the language of said Carmack Amendment to the Hepburn law, as amending Section 20 of the Act to Regulate Commerce of February 4, 1887, declared that the carrier should be liable "for any loss, damage or injury" to property received for transportation which was "caused by it" or any connecting carrier—this Court held that said Carmack Amendment, making the initial carrier liable not only for its own negligence, but the negligence of connecting carriers, did not operate to prevent

the carrier from making a contract for *limited liability* where the contract was fair and the lower rate secured by the shipper was obtained upon the faith of an agreed valuation of the property shipped. This construction of the Carmack Amendment was announced by this Court, speaking through Mr. Justice Lurton, in the case of *Adams Express Company v. Croninger*, 226 U. S., 491-503; and following this decision there was a line of cases decided in which this Court continued to administer this same rule in construing and applying the Carmack Amendment.

Adams Express Co. v. Croninger, 226 U. S., 491;
Wells Fargo Co. v. Nieman-Marcus Co., 227 U. S., 469;
Kansas So. Ry. v. Carl, 227 U. S., 639;
M. K. & T. Ry. v. Harriman, 227 U. S., 657;
Chicago, R. I. & P. Ry. v. Cramer, 232 U. S., 490;
Boston & Maine R. R. v. Hooker, 233 U. S., 97;
A. T. & S. F. Ry. v. Robinson, 233 U. S., 173;
Pierce Co. v. Wells Fargo & Co., 236 U. S., 278.

(4) Before the passage of the Carmack Amendment, many of the States had common law rules or had enacted statutes declaring the carrier liable for the *full actual value* of or *damages* to property destroyed or injured in transit, notwithstanding agreed valuations or attempted stipulations to the contrary in the bill of lading; and these State statutes were uniformly sustained and upheld by this Court.

In the *Solan* case, such an Iowa statute, and in the *Hughes* case, such a Pennsylvania rule, were so upheld; and in the *Croninger* case, which was decided after the passage of the Carmack Amendment, the Court, speaking through Mr. Justice Lurton, declared that if the Kentucky statute involved in that case could still be regarded as controlling, it would result that the carrier was liable for the *full valuation* of the property, notwithstanding its agreed or declared value in the bill of lading.

Chicago, Milwaukee, etc. Railway. v. Solan, 169 U. S., 133;

Pennsylvania R. R. Co. v. Hughes, 191 U. S., 477;

Adams Express Co. v. Croninger, 226 U. S., 491, 501-13.

(5) In the *Croninger* case, *supra*, it was held that with the passage of the Carmack Amendment the field of permissible Federal legislation was thereby occupied by this Act of Congress, and that all State statutes and rulings undertaking to declare the carrier liable for full value and damages notwithstanding attempted limited liability contracts with the shipper,

were superseded and became inoperative and passed out of existence, so far as interstate commerce or shipments were concerned; and this ruling was continuously and consistently followed until the passage of the Cummins Amendment of March 4, 1915.

Adams Express Co. v. Croninger, 226 U. S., 491, and other cases cited under proposition 3 *supra*.

(6) It was to *meet the above situation*, in which it was held that the Carmack Amendment had superseded these State statutes and rulings exacting full liability, and to *obviate the construction* placed upon the Carmack Amendment in the *Croninger* case, by which it was held that notwithstanding the language of said Act of Congress carriers could still make such limited liability contracts, when same were fairly made and the reduced rate obtained was based upon the declared value of the shipment—that the Cummins Amendment of March 4, 1915, was passed.

The reports of the Senate and House committees, and the debates in Congress, demonstrate that this is so, and the Courts have consistently recognized this and ruled accordingly.

Chicago etc. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S., 97-100;

McCaull-Dinsmore Co. v. Chicago etc. Ry. Co. (D. C., Minnesota, 4 Div.), 252 Fed., 664;

Chicago, M. & St. P. Ry. v. McCaull-Dinsmore Co. (C. C. A., 8th Circuit), 260 Fed., 835;

Alaska S. S. Co. v. U. S. (D. C., Sou. Dist., New York), 259 Fed., 713, 718-722;

Congressional Record, 63rd Congress, 2nd Session, Vol. 51, pp. 9619-9626, 9777-9783;

Congressional Record, 63rd Congress, 3rd Session, Vol. 52, pp. 5446-5451;

(7) The Cummins Amendment of March 4, 1915, expressly declares *liability for full value and damages* in a case like the one at bar; and its language is so explicit, unambiguous and sweeping, and the purpose of its passage and enactment are so manifest and well recognized, that the very language of this amendment meets and overturns all possible contentions of the Express Company under the Writ of Error and the uncontroverted facts of this case.

38 Stat. L., 1196, 1197;

Quoted at length Post, pp. 67-69.

No argument grounded on "convenience," and no argument based upon the "history" of the statute, or upon the "policy" of the later act of August 9, 1916, c. 301, 39 Stat., 441 (known as the "Second Cummins Amendment"), can prevail against the plain meaning of the words of the Cummins Amendment of March 4, 1915, and the Courts, including this Court, have expressly so ruled and declared.

Chicago etc. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S., 97, 99-101;

Chicago, M. & St. P. Ry. v. McCaull-Dinsmore Co. (C. C. A., 8th Circuit), 260 Fed., 835-837;

McCaull-Dinsmore Co. v. Chicago etc. Ry. Co. (D. C.), 252 Fed., 654-667;

Alaska S. S. Co. v. U. S. (D. C.), 259 Fed., 713-715, 716, 718-722.

(8) The holding of the District Judge and the Circuit Court of Appeals below are in square accord with the ruling made by all the Courts before which the Cummins Amendment of March 4, 1915, has come for construction; and, as pointed out by the learned District Judge below, the passage of the later amendment of 1916, known as the "Second Cummins Amendment," emphasizes the correctness of the rulings below, which are now under attack.

Rulings of Hon. E. T. Sanford below. (Trans., pp. 38, 39.)

(9) We do not understand that the constitutionality of the Cummins Amendment of March 4, 1915, is under attack in the instant application. This amendment has been construed and administered by this Court in the case of *Chicago etc. Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S., 97-100, and of course it results from the opinion of this Court in the *Croninger* case, which upheld and construed the Carmack Amendment, as well as the previous opinions of this Court upholding the State statutes which declared full liability before the passage of the Carmack Amendment, that the Cummins Amendment of March 4, 1915, is unquestionably constitutional and valid legislation.

Adams Express Co. v. Croninger, 226 U. S., 491, 500;

Chicago M. & St. Paul Ry. v. Solan, 169 U. S., 133-137;

Pennsylvania R. R. Co. v. Hughes, 191 U. S., 477, 487, 491.

(10) By the act of August 9, 1916, Ch. 301, 39 Stat. L., 441, known as the "Second Cummins Amendment," the fourth from the last proviso of the Cummins Amendment of March 4, 1915, was amended so as to read as follows:

"*Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses.*"

39 Stat. L., Ch. 301, p. 441.

Pub. Stat. Anno. Sup., 1918, pp. 387, 388.

The above mentioned Act of Congress of Aug. 9, 1916, Ch. 301, 39 Stat. L., 441, known as the Second Cummins Amendment, was before this Court for construction in a recent case.

American Ry. Express Co. v. A. J. Lindenburg, 67 L. Ed., 227-231; Adv. Opinions, pamphlet No. 7, Feb. 1, 1923.

This Act of August 9, 1916, amending the Cummins Amendment of March 4, 1915, can, of course, have no bearing on the instant controversy. As to this the Court of Appeals in its opinion in the instant case, said:

"The situation as respects the contract in this case is not changed or affected by the second Cummins Amendment (Act Aug. 9, 1916, C. 301, 39 Stat. 441—passed more than a year after the making of the contract and shipment here in question) which second amendment excepts from the prohibition against limitation of liability 'property, *except or*

dinary livestock, received for transportation, concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing, as the released value of the property,' etc." (Trans., p. 50.)

The only questions sought to be presented under the Writ of Error sued out in this case arise from the effort of the Express Company, by some process of reasoning (which we admit we do not understand) to take this case and its admitted facts out of the plain and unmodified language of the Cummins Amendment of March 4, 1915.

The Writ of Error Should be Dismissed, Because Not Permissible Procedure in This Case

While in this case the Express Company has sued out a Writ of Error, its learned counsel appeared by no means certain that such writ would lie; and accordingly the Express Company has also filed a Petition for Certiorari to the Circuit Court of Appeals of the Sixth Circuit in this case.

We quote the following from the Express Company's said Petition for Certiorari, heretofore submitted to this Court:

"Petitioner, doubting whether the face of the plaintiff's declaration sufficiently discloses the jurisdiction of the District Court rested upon questions arising under the Commerce Act, as well as diverse citizenship, files this petition for certiorari, in order that this Court may certainly have jurisdiction to review and determine the important public questions presented on the record in both Courts, and arising under the Commerce Act." (Petition for Certiorari, p. 2.)

It is very plain to us that from the face of plaintiff's declaration in the District Court below (and that is the controlling thing) this case is one wherein the jurisdiction was dependent entirely and alone upon diversity of citizenship. This being so, the judgment and holding of the Court of Appeals was *final*; and this being so, the only remedy now is by application for the Writ of Certiorari.

Judicial Code Sec's., 128, 239, 240;
36 Stat. L., 1133; 36 Stat. L., 1157;
26 Stat. L., 828.

That diversity of citizenship was the fact of jurisdiction in the District Court below was plainly averred in both the original and amended declarations, and was indeed made the subject matter of express stipulation in the District Court below. (Trans., pp. 1; 6, 7; 35.)

That plaintiff Darden, in his declaration, by merely referring to the Cummins Amendment of March 4, 1915, did not thereby primarily invoke the jurisdiction of the court under that Act of Congress, has been expressly ruled in effect by this Court.

Bankers Casualty Co. v. Minn., St. P. Ry. Co., 192 U. S., 371; 382-386;

Lovell, Trustee in Bankruptcy of Knight v. Newman & Son, 227 U. S., 412-426.

The case of *Bankers Casualty Co. v. Minneapolis, St. P. etc. Ry.*, 192 U. S. 371-386, *supra*, was an action commenced in the Circuit Court of the United States by a citizen of one State against a railroad company, citizen of another State, for damages for the negligent loss of a registered mail package. The plaintiff relied on principles of general law applicable to negligence, and did not put in *controversy* the construction of any provision of the Constitution or of any law of the United States, on which the recovery depended. In the complaint, however, it was averred as follows:

"That section 713 of the postal laws and regulations of the United States of the year A.D. 1893, which was in force at the time of the receipt and transmission of said registered package, is in words and figures as follows, to wit: 'The railroad company will also be required to take the mails from and deliver them into all intermediate post offices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed.'"

"That said post office at Harvey was an intermediate post office and was located not more than 80 rods from defendant's railroad station, or depot, at or near said town of Harvey.

"That under said postal regulation it was the duty of said defendant to provide a sufficient and safe receptacle or place for the safety and security of said mail, while in its said custody; also to safely care for and guard said mail sack and its contents during the night; also to safely de-

liver the same to the postmaster or postmistress at the post office in said town of Harvey, North Dakota.

"But neglecting its said duty in the premises, defendant wholly failed and neglected to provide any receptacle or place for the safe or secure keeping of mail, and also failed to place a duly sworn official in charge of said mail sack and further wholly failed to safely care for or guard said mail sack and its contents, and also wholly failed to safely deliver the same at the post office to the postmaster in said town of Harvey."

192 U. S., 381-382.

In the course of the opinion in the above case this Court, speaking through Mr. Chief Justice Fuller, among other things, said:

"It will be perceived that plaintiff relied on principles of general law applicable to negligence, and to the liability of defendant if there were negligence, and nowhere asserted a right which might be defeated or sustained by *one* or *another* construction of the Constitution or of any law of the United States."

192 U. S., 382.

And a little later in the same opinion this Court said:

"In other words, no *definite issue* in respect of a right claimed under the Constitution or any law of the United States was *deducible* from plaintiff's statement of its case, and if the postal regulations could, under circumstances, be regarded as laws of the United States creating a right which might be *denied* or *secured* according to *one* construction or *another*, it did not appear that the construction of the extract from section 713 of those regulations was in any way in *dispute* or *could have been*. And the averments of the complaint cannot be helped out by resort to the other pleadings or to judicial knowledge. *Mountain View etc. Company v. McFadden*, 180 U. S., 533; *Arkansas v. Kansas & Texas Coal Company*, 183 U. S., 185."

192 U. S., 383.

In the above case this Court accordingly held that the jurisdiction of the Federal trial court below "depended entirely upon diversity of citizenship," and the Writ of Error was accordingly dismissed. (192 U. S., 386.)

The above quoted decision of this Court is conclusive, we submit, upon the proposition that in the case at bar the jurisdiction

of the District Court below, as averred in the declaration, was "dependent entirely" upon the diversity of citizenship.

Section 128 of the Judicial Code (36 Stat. L., 1133) declaring that decrees of Circuit Courts of Appeals shall be final in all cases—"in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States"—is drawn literally from the corresponding provisions of Section 6 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L., 828, 4 Fed. Stat. Anno., 409.

In the case at bar both the original and the amended declaration began by averring the diversity of citizenship of plaintiff Darden and the Express Company as the ground of jurisdiction. (Trans., pp. 1; 6, 7.)

All that appeared in either the original or the amended declaration in respect of the Cummins Amendment of March 4, 1915, was that it was alleged, in each of said declarations, that defendants, on July 7, 1915 (the date of the wreck in question) and for long prior thereto,

"were common carriers, railroads or transportation companies subject to the provisions of an Act of Congress of the United States of America entitled 'An Act to Regulate Commerce,' passed February 4, 1887, and other Acts of said Congress amendatory thereof, and particularly an Act passed March 4, 1915." (Trans., pp. 1; 7.)

In both the original and the amended declarations in the case at bar the plaintiff for his right to a recovery, relied on principles of the general law applicable to negligence. (Trans., pp. 3-5; 8-11.)

In the case at bar, just as in the case of *Bankers Casualty Co. v. Minneapolis, St. P. etc. Ry.*, 192 U. S., 371; 381-383, above quoted, plaintiff Darden in his original and amended declarations

"nowhere asserted a right which might be defeated or sustained by one or another construction of the Constitution or of any law of the United States."

And in the case at bar, just as in the 192 U. S. case above quoted, "no definite issue" in respect of a right claimed under any

law of the United States "was deducible from plaintiff's statement of his case"; and it did not appear that the "construction" of the Cummins Amendment of March 4, 1915, "was in any way in dispute, or could have been." And as above stated, the declaration or complaint is alone controlling of the question as to whether the jurisdiction below depended entirely upon a diversity of citizenship; and as to this question, as ruled in the 192 U. S. case above quoted, the declaration or complaint "cannot be helped out by resort to the other pleadings or to judicial knowledge."

And it appears to be the well settled rule that where diverse citizenship is the only ground of jurisdiction appearing on the face of the declaration or complaint at the time the jurisdiction of the Federal Court was invoked, the decision of the Circuit Court of Appeals is final, though another ground of jurisdiction may be developed in the course of the proceedings.

Arbuckle v. Blackburn, 191 U. S., 408;

Spencer v. Duplan Silk Co., 191 U. S., 526;

Huguley Mfg. Co. v. Gleton Cotton Mills, 184 U. S. 294.

Arkansas v. Kansas etc. Coal Co., 183 U. S., 185.

American Sugar Refining Co. v. New Orleans, 181 U. S., 277.

Pope v. Louisville, etc. R. Co., 173 U. S., 573.

And the above is true though it later turns out that the case involves the construction or application of the Constitution of the United States, or the validity or construction of a treaty is drawn in question, or the constitution or law of a State is claimed to be in contravention of the Constitution of the United States—which would have justified a direct appeal to the Supreme Court.

American Sugar Ref. Co. v. New Orleans, 181 U. S., 280;

Ex. P. Jones, 164 U. S., 691 ;

Press Pub. Co. v. Monroe, 164 U. S., 105;

Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S., 138.

And even a formal statement or allegation that the cause of action was one arising under the Constitution or laws of the United States does not suffice, "since it is settled that a mere formal statement to that effect is not enough" to satisfy the rule of pleading.

Norton v. Whiteside, 239 U. S., 144.

And it has been ruled by this Court that the jurisdiction below is "dependent entirely" upon diverse citizenship within the meaning of the language of the Section in question, where that is the sole ground of jurisdiction disclosed by the complaint, although a Federal question may have been raised at the trial.

Bagley v. General Fire Extinguisher Co., 212 U. S., 477.

And we call the Court's attention to the fact that in the one case in which the Cummins Amendment of March 4, 1915, was before this Court for construction, the case was presented to your Honors upon an application for a Writ of Certiorari, and was not sought to be brought up by Writ of Error—counsel for the litigants in said case evidently agreeing with our contention that Writ of Error would not be appropriate appellate procedure in such a case, where diversity of citizenship appeared as the primary ground of jurisdiction asserted in the court below, even though the Cummins Amendment of March 4, 1915, was the controlling thing in respect of the measure of damages.

Chicago, M. & St. P. Ry. v. McCaull-Dinsmore Co., 253 U. S., 97.

Although the question which it is now sought to have this Court review in the instant case relates "solely" to the measure of damages and depends for its decision upon the application of the plain provisions of the Cummins Amendment of March 4, 1915, to the Interstate Commerce Act (Petition for Certiorari, p. 2)—this is immaterial, of course, upon the question now presented by us, that is, that the jurisdiction of the court below as invoked by the complaint or declaration of plaintiff Darden, depended entirely upon diversity of citizenship.

It would seem perfectly manifest that even if the terms and provisions of the Cummins Amendment of March 4, 1915, were inapplicable to this case (as the Express Company seems to insist, without any grounds therefor, as we submit) plaintiff Darden by his declaration below, in any event, presented, and only presented, a case for recovery, depending for its jurisdiction alone upon the diversity of citizenship alleged, and in which he would be entitled, in any event, to recover the value of his horses as stated in the pretended "shipping contract," which we have hereinbefore shown was no contract at all, by the undisputed evidence in the case, and which contract was not referred to at all in either the original or the amended declarations, the allega-

tions of which are controlling upon the question as to whether the jurisdiction invoked "depended entirely" on diverse citizenship.

We submit that it is the well settled rule that where the declaration or complaint avers and shows jurisdiction existing upon the ground of diverse citizenship, the mere fact that in the trial of the case it becomes necessary to administer an Act of Congress, as for example in arriving at the true measure of damages, does not prevent the case from being one in which the *jurisdiction* is "dependent entirely" upon diversity of citizenship within the meaning of the section of the Judicial Code in question; nor from being a case in which the decision of the Court of Appeals is final, thus making Writ of Error inapplicable and improper appellate procedure.

We are familiar, of course, with the rule that where "a ground of Federal jurisdiction" in *addition* to the ground of diverse citizenship, is set up in the declaration, complaint or the bill, the decision of the Court of Appeals will not be *final* so as to make certiorari the only appropriate appellate procedure, and so as to make appeal or Writ of Error inapplicable—unless the "ground of jurisdiction," *other* than diverse citizenship, can be said to be "so unsubstantial as to be frivolous."

Weiland v. Pioneer Irrigation Co., decided June 5, 1922,

Advance Opinions—U. S.—66 L. Ed., 639, 640;

Shulthis v. McDougal, 225 U. S., 561, 56 L. Ed., 1205;

Lowell v. Newman & Son, 227 U. S., 412, 57 L. Ed., 577, 580.

In the case at bar, however, the declaration did no more than allege that the defendants, at the time of the accident on July 7, 1915, were common carriers or transportation companies subject to the provisions of the Act to Regulate Commerce, and other Acts amendatory thereof, "and particularly an Act passed March 4, 1915" (the Cummins Amendment). (Trans., pp. 1; 7.)

Diversity of citizenship, according to good pleading, was the only ground of *jurisdiction* alleged. The declaration of plaintiff Darden, as we have seen, did not attempt to assert a right which might be defeated or sustained by one or another construction of the Cummins Amendment; did not allege any attempted *limitation* on the right of recovery; and said declaration, in both its original and amended form, relied for recovery on the general

principles of the law of *negligence* alone, and invoked the Federal *jurisdiction* according to the principles of pleading, alone and entirely upon the ground of diverse citizenship. (Trans., pp. 1; 6,7.)

In such a case we submit the judgment or decree of the Court of Appeals is *final* and appeal or Writ of Error will not lie.

We accordingly submit that our motion to dismiss should be sustained, because the decree and holding of the Circuit Court of Appeals was final in this case.

ARGUMENT

State of the Law when the Cummins Amendment of March 4, 1915, was Passed; and the Purpose and Scope of that Amendment.

As hereinbefore stated it was well settled by the decisions of this Court at an early day that a common carrier could not by contract exempt itself from liability for loss by negligence, and we have hereinbefore, under our proposition (1) in this Brief, cited the decided cases to that effect. *Ante* p. 22.

In the case of *Hart v. Pennsylvania Railroad*, 112 U. S., 331, it was clearly held and settled that a contract for limited liability by a common carrier to a shipper, when fairly made, did not contravene the settled principle of common law preventing the carrier from contracting against liability for its negligence. In this case, in summing up the view of the Court, it was said:

"The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is *fairly made*, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Squire v. New York Central R. R. Co.*, 98 Mass., 239, 245, and cases there cited."

112 U. S., 343.

The above case was followed by a long line of harmonious decisions construing limited liability contracts both before and after the Carmack Amendment.

The Carmack Amendment to the Hepburn Law, as amending Section 20 of the Act to Regulate Commerce, of February 4, 1887, for ready reference can be found printed in the margin of the report of the case of *Adams Express Co. v. Croninger*, 226 U. S., 503.

After the passage of the Carmack Amendment it was construed by this Court in a line of cases in connection with limited

liability contracts, and these cases held that the Carmack Amendment, making the initial carrier liable not only for its own negligence but the negligence of connecting carriers, did not operate to prevent the carrier from making a contract for limited liability, where the contract was fair, and the lower rate obtained by the shipper was allowed upon the faith on an agreed valuation of the property—notwithstanding the language of the Carmack Amendment that the carrier should be liable “for any loss, damage or injury” to the property “caused by it” or any connecting carrier. In other words, after the Carmack Amendment, this Court, speaking through Mr. Justice Lurton in the *Croninger Case*, continued to administer the principle announced in the *Hart Case*, and in the course of the opinion, quoting that case, said:

“The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It extracts from the carrier the measure of care due to the value agreed upon. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is *no deceit* practiced on the shipper, should be upheld.”

226 U. S., 510, 511.

Following the *Croninger Case* (226 U. S., 493) there were numerous other cases in which this Court administered the same rule in construing the Carmack Amendment.

Adams Ex. Co. v. Croninger, 226 U. S., 491;
Wells, Fargo & Co. v. Neiman-Marcus Co., 227 U. S., 469;
Kansas Sou. Ry. v. Carl, 227 U. S., 639;
M. K. & T. Ry. v. Harriman, 227 U. S., 657;
Chicago, R. I. & P. Ry. Co. v. Cramer, 232 U. S., 490;
Boston & Maine R. R. v. Hooker, 233 U. S., 97;
A. T. & S. F. Ry. v. Robinson, 233 U. S., 173;
Pierce Co. v. Wells, Fargo & Co., 236 U. S., 278-287.

Before the passage of the Carmack Amendment, many of the States enacted statutes or enforced common law rules declaring and holding the carrier liable for the full actual value of or damages to property destroyed or injured in transit, notwithstanding agreed valuation or attempted stipulation to the contrary in the bill of lading or contract of shipment; and these

State statutes and rulings were uniformly upheld and sustained by this court.

In one case before this Court such an Iowa statute was upheld; in another, such a Pennsylvania ruling was upheld; and in the *Croninger* case the Court, speaking through Mr. Justice Lurton, declared that if the Kentucky statute involved in that case could still be regarded as controlling, it would result that the carrier was liable for the full valuation of the property, notwithstanding its agreed or declared value in the contract of shipment.

Pennsylvania R. R. Co. v. Hughes, 191 U. S., 477;
Chicago, Milwaukee etc. Ry. v. Solan, 169 U. S., 133;
Adams Express Co. v. Croninger, 226 U. S., 491, 501-513.

In the *Croninger* case, *supra*, it was held, however, that with the passage of the Carmack Amendment this Federal legislation superseded and rendered inoperative, so far as interstate shipments were concerned, all the statutes and common laws of the several States undertaking to declare full liability against common carriers, notwithstanding attempted limited liability contracts.

And it was to meet and obviate the above state and condition of the law resulting from the construction of the Carmack Amendment announced in the *Croninger* case, that the Cummins Amendment of March 4, 1915, was passed. The proceedings in Congress clearly and expressly show this; and the decisions of the Courts before which the Cummins Amendment of March 4, 1915, later came for construction and enforcement, expressly recognize and declare this to be true—as we shall later see.

In the original report of April 6, 1914, made by the Committee on Interstate Commerce to the Senate of the 63d Congress, Second Session (Report No. 407), recommending the passage of the Cummins Amendment in the form approved by said committee, it is stated:

“While at common law common carriers could not escape the consequences of their negligence by stipulating for a release of liability, either in whole or in part, yet the common law, as interpreted by the Supreme Court of the United States, and by the appellate court of some States, recognized as valid agreements between shippers and common carriers limiting the liability of the carrier to an agreed amount. In some cases the limitation was sustained on the theory that the shipper was estopped by his representations of value to

claim a large amount, and in other cases upon the theory that the shipper had received a lower rate for the transportation of his property than would have been given him had the actual value been stated. Many States have statutes forbidding such limitations and requiring carriers to respond in the full amount of loss, damage, or injury occasioned by their negligence, and in some States the courts of last resort construed the common law to forbid such limitation.

"The Supreme Court of the United States held in the case of the *Pennsylvania Railroad Co. v. Hughes*, (191 U. S., 477), that, notwithstanding it had held in many decisions to the contrary, the decision of the Supreme Court of Pennsylvania in that case to the effect that all agreements limiting the liability to less than the actual loss or damage were void at common law should govern and be affirmed, and in the case of *Solan v. Chicago, Milwaukee & St. Paul Railroad Co.*, (169 U. S., 133), the Supreme Court of the United States affirmed the decision of the Supreme Court of Iowa, which held valid a statute that forbade any limitation of the liability of a carrier for negligence and requiring it to pay full amount of loss, damage, or injury.

"The so-called Carmack Amendment, adopted in 1906, construed by the Supreme Court of the United States in the case of *Adams Express Co. v. Croninger*, and in other cases, had the effect of abrogating State laws forbidding limitations in bills of lading and receipts on the liability of carriers for negligence and consequent damage or injury to property transported in interstate commerce. The Amendment was held to be a Federal regulation of interstate commerce, dealing with the rights of carriers and shippers under bills of lading and not prescribing full liability for damage or injury to property transported in interstate commerce, and that limitations of recovery to less than actual loss or damage caused by the carrier in bills of lading or receipts are valid.

"It is, of course, necessary, where the property shipped is hidden from view by wrapping, that the representation as to value made by the shipper shall in all cases be binding upon him. This exception covers a large number of articles shipped in interstate commerce, and especially many of those carried by express companies."

Said Cummins Amendment, as same was reported by the Senate Committee on Interstate Commerce, was, however, amended on the floor of the Senate after considerable debate. These debates not only show in many connections what was shown by the report of the Senate Committee quoted above (that the Cum-

mins Amendment was intended to meet and obviate the Croninger case, as this case had developed "defects" in the Carmack Amendment), but also show the particular abuse by the carriers which made necessary the passage of the Cummins Amendment.

An examination of the Congressional Record of the 63d Congress, 2nd Session, Vol. LI, at pages 9623 and 9624, shows that Senator Cummins, among other things, said:

"A man drives his carload of steers to town to send them to Chicago from my State, and there is put before him by the railroad company a bill of lading or a contract, which contains a declaration as to the value of those steers. The shipper signs that declaration. Of course, the declaration is well known to everybody to be false; I mean as to value. The shipper says the steers are worth \$25, or \$50 apiece; and the liability of the railroad company is limited to that amount. The shipper has no more chance to enter into an agreement with the railroad company upon even terms than a child would have in a wrestling match with a prize fighter."

And on the same page of this volume of the Congressional Record it appears that Senator Reed (who succeeded in having an amendment to the Act as reported by the Senate Committee adopted by the Senate, which amendment made the Act still more liberal to shippers, and still more restricted the power of the Interstate Commerce Commission in regard to establishing rates dependent upon value, and which amendment shaped up the *proviso* to the Cummins Amendment as it was finally passed by both houses, and signed by the President) had this to say:

"Mr. President: I think the difficulty here does not lie in the fact that a rising rate charge is imposed, but it lies in the fact that the railroad being given the power to fix a rising rate, uses that power in such a way as to practically *force a limitation on the liability* they incur; in other words, let us say the ordinary shipping rate is \$50 a car, and that that is a *fair rate*. They hand the shipper a contract limiting the liability to one-tenth of the real value; he has the option to sign that contract or to pay \$100 a car; and by that device they force him to take the risk which the law seeks to impose upon them."

Cong. Rec., Senate, p. 9624.

In other words, the Cummins Amendment as the same was passed by the Congress and approved by the President, was enacted to prevent a carrier from doing just what the Express

Company is endeavoring to accomplish in the case at bar—that is, practice a *device* which forces the shipper to take the risk which the law seeks to impose on the carrier, while the carrier at the same time is receiving a reasonable and acceptable rate for the shipment.

We will next call your Honors' attention to the decided cases in which the Courts, including this Court, have had occasion to construe the Cummins Amendment of March 4, 1915, and in which effect has uniformly been given to the unambiguous and plain language of this Act of Congress, and in which the reasons for the passage of the Act and the abuses which it sought to remedy, are recognized and stated.

**McCaull-Dinsmore Co. v. Chicago, Etc.,
Ry. Co., 252 Fed., 664.**

The above case which came first before Morris, District Judge, in Minnesota, was decided August 23, 1918.

In the above case it was held that under the Cummins Amendment where wheat was lost in transit the carrier was liable for the value of the grain at the "point of destination"—notwithstanding the shipment was made under a contract known as a "Uniform Bill of Lading," which was part of the published tariffs filed with the Interstate Commerce Commission, and which provided that the loss should be computed on the value of the property—"at the time and place of shipment."

It will be observed that in the above case said tariffs provided among other things a rate of transportation based on and controlled by said bill of lading or contract; and said tariffs further provided that in cases where the shipper was not agreeable to shipping under the terms of said contract or bill of lading, then a *higher rate* of transportation was provided by said tariffs.

The District Court administered the Cummins Amendment according to its *clear terms*, and held the carrier liable for the full, actual loss, on the basis of the value of the grain at the point of *destination* as the common law required, notwithstanding the fact that the tariff had provided that the damages should be ascertained on the basis of the value at the time and place of the shipment if the cheaper rate was used by the shipper, and

notwithstanding the fact that the shipper had shipped *on said cheaper rate*.

In the course of its opinion the Court, in speaking of the Cummins Amendment, said:

"This amendment was passed after the decision of the Supreme Court on the Carmack Amendment (Act June 29, 1906, c. 3591, Sec. 7, pars. 11, 12, 34 Stat., 595), cited by counsel had been rendered, and it is apparent from its language that its proposal and enactment were caused by these decisions, and that it was aimed directly at them. Viewed in the light of those decisions and of the purpose evidently sought to be accomplished, it is difficult to see how its language could be more sweeping:

"Shall be liable . . . for the full *actual loss* caused by it . . . notwithstanding *any limitation* (the italics are mine) of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and *any such limitation*, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void."

"This is the language of the amendment so far as it touches this case. The first proviso indicates the cases, of which this is not one, and the only cases, exempt from that language, and the only way in such cases of avoiding its terms, and thus *emphasizes*, and, if that were possible, makes more sweeping those terms. I do not see that it can make any difference under the language quoted that this bill of lading was provided for in the schedule of rates filed with the commission, and that that schedule of rates also provided another bill of lading under which, if issued and accepted, the rate would have been higher." 252 Fed., 665, 666.

And the Court, in the above case, held (just as his Honor the District Judge below held in the case at bar; Trans., pp. 38, 39, 40), that the Interstate Commerce Commission had been without power to make any ruling or approve any tariff which permitted a rate based on less than actual value, except in the particular cases specified in the Cummins Amendment, where the goods shipped were hidden and their nature was not disclosed to the carrier; and in this connection the Court said:

"From the foregoing simple statement, I do not see how it is possible to escape the conclusion, upon a fair and open-minded consideration of the language of the amendment

and the obvious and well-known meaning of its terms, that this provision or stipulation in the bill of lading is a limitation of the liability of the carrier and of the amount of recovery, and is therefore unlawful and void. In reaching this conclusion I have not failed to consider the very able argument of counsel for defendant, and also what has been said by the Interstate Commerce Commission, and it is with regret and not a little misgiving that I find myself in difference with men so able and experienced in such matters. But consider the matter as I may, I am always irresistibly brought back to this simple statement and to the necessary conclusion therefrom."

252 Fed., 666.

The above case came before the Circuit Court of Appeals of the Eighth Circuit and is reported under the style of—

**Chicago M. & St. P. Ry. Co. v. McCaull-
Dinsmore Co., 260 Fed., 835.**

The Circuit Court of Appeals of the Eighth Circuit, consisting of Hook and Stone, Circuit Judges, and Amidon, District Judge, affirmed the holding of the District Judge below. The Circuit Court of Appeals consumes by far the larger part of its opinion in merely quoting the language of the Cummins Amendment—and then the Court says, by way of answering an *identical argument* with that advanced by our learned adversaries in the case at bar:

"The railway seeks to avoid the application of this provision by contending that it, in the present instance, has not sought to limit its liability, but has, on the contrary, defined liability for the full, actual loss, and has by its tariffs thus crystallized the method of arriving at the actual loss. We deem such contention unsound. There was no uncertainty as to the time or place of estimating value under the rule of common law—it was the destination. The evident purpose of the provision in the bill of lading was not to introduce certainty, but to avoid the rule existing at law, for the obvious object of escaping a *higher valuation* which would often arise at destination. Such a provision is unquestionably a limitation, since it forbids application of the established rule."

260 Fed., 836.

And in the above case the Court concluded its opinion with the following:

"The Cummins Amendment was not concerned alone with preventing contracts already illegal under the common law, but with prohibiting all agreements having the effect defined by that statute. Congress passed this act to remedy the defects in the Carmack Amendment (Act June 29, 1906, c 3591, sec. 7, pars. 11, 12, 34 Stat., 595, Comp. St., secs. 8604a, 8604aa)-as developed in the case of *Adams Express Co. v. Croninger*, 226 U. S., 491, 33 Sup. Ct., 148, 57 L. Ed., 314, 44 L. R. A. (N. S.), 257, and intended thereby to *fully and finally prevent all limitations of this character*. Congressional Record, 63d Congress, 3rd Session, Vol. 52, pp. 5446-5451."
260 Fed., 837.

The above case then finally came before this Court, and is reported under the style of

**Chicago, Etc., Ry. Co. v. McCaull-Dinsmore
Co., 253 U. S., 97-100.**

After a brief statement of the case and quoting certain terms and provisions of the Cummins Amendment, this court, speaking through Mr. Justice Holmes, commented upon the decisions of the Interstate Commerce Commission in upholding the provision and regulation in question, as contained in the tariff, both before and after the passage of the Cummins Amendment. In this connection this Court said:

"Before the passage of this amendment the Interstate Commerce Commission had upheld the clause in the bill of lading as in no way limiting the carrier's liability to less than the value of the goods but merely offering the most convenient way of finding the value. *Shaffer & Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 21 I. C. C., 8, 12. In a subsequent report upon the amendment it considered that the clause was still valid and not forbidden by the law, 33 I. C. C., 682, 693. The argument for the petitioner suggests that courts are bound by the Commission's determination that the rule is a reasonable one. But the question is of the *meaning of a statute* and upon that, of course, the courts must decide for themselves."

253 U. S., 99.

And then, by way of declaring that the language of the Cummins Amendment was very plain and explicit, and did not leave any basis for any argument grounded upon the history of the statute, or grounded upon convenience, or grounded upon the policy of the later Act of August 9, 1916, this Court said:

"We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily prevent a recovery of the full actual loss, and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule. But the question is how the contract operates upon this case. In this case it does prevent a recovery of the *full actual loss*, if it is enforced. The rule of the common law is not an arbitrary fiat but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions, which have been made and are not in question here. It seems to us, therefore, that the decision below was right, and as, in our opinion, the conclusion is required by the statute, *neither the convenience of the clause, nor any argument based upon the history of the statute or upon the policy of the later act of August 9, 1916, c. 301, 39 Stat., 441, can prevail against what we understand to be the meaning of the words.* Those words seem not only to indicate a *broad general purpose*, but to apply *specifically to this very case.*"

253 U. S., 99, 100.

Indeed, this Court had long before ruled that the *legal conditions and limitations* in a carrier's bill of lading duly filed with the Interstate Commerce Commission, are binding until changed by that body, but not so of conditions and limitations contained in such bill of lading which are illegal, and consequently void.

Boston & Maine R. R. v. Piper, 246 U. S., 439-445.

From all the above, we respectfully submit that it is perfectly clear that the Cummins Amendment of March 4, 1915 was passed for the *purpose* of preventing, and the clear and explicit language of this Act of Congress *absolutely prevents* a carrier or transportation company, like the Express Company, from being able to escape liability for *full actual value* and damages in a case where it has "received property for transportation" from a point in the United States to a point in an adjacent foreign country, and the loss or damage to the shipment has been "caused by it" (the carrier), or any carrier to whom the shipment was delivered.

Rates Based on Value

Our adversaries will insist (because such was their insistence in the Circuit Court of Appeals below, and such was their insistence in their brief filed in support of their Petition for Certiorari in this Court) that the District Judge was in error when he expressed the view that under a proper construction of the Cummins Amendment of March 4, 1915, in unmodified form, it was not permissible for the carrier to have rates based on value where the property shipped was not concealed by wrapping or boxing—a construction of the Cummins Amendment which our adversaries say the Court of Appeals in this case assumed, for the argument only, to be an inaccurate construction.

Our adversaries insist that such construction of the Cummins Amendment by the learned District Judge was incorrect, because they say,

“such a construction of a mere amendment to the Commerce Act should not be sustained, since it brings the statute in conflict with what this Court said in *Express Co. v. Croninger*, 226 U. S., 508, that a carrier has the inherent right to receive a compensation commensurate with the risk; it is clear Congress had no purpose to impose such a hardship on carriers or shippers, and the history and purpose of the amendment forbids such a construction.”

Pet. for Cert., p. 9.

We cannot follow the reasoning of our adversaries when they thus insist that the construction placed upon the Cummins Amendment of March 4, 1915, by the District Judge should not be sustained because, as they say, it is a “mere amendment” to the Interstate Commerce Act, and that such a construction would bring said Amendment in conflict with what this Court said in *Express Company v. Croninger*, 226 U. S., 508. We have already seen that, admittedly, this Cummins Amendment of March 4, 1915, was passed for the very purpose of obviating the state of the law resulting from the holding in said *Croninger* case.

Ante., pp 24; 37-44.

What the District Judge said in regard to the right of the carrier or transportation company to charge rates based on value, after the passage of the Cummins Amendment of March 4, 1915, was the following:

"I am very much inclined—although it is not necessary for me to determine that—I am very much inclined to think I was in error in the first trial of this case when I expressed the opinion that it was proper, after the passage of the Cummins Amendment, to have different rates based on value, the practice followed by the Interstate Commerce Commission in establishing rates based on graded value. I am very strongly inclined to think that that Cummins Amendment intended to stop that entirely, and intended to make the carrier liable for the full value and that necessarily would take away rates based on values, where the whole consideration for the lower rate was that there was to be a reduced liability. If the liability was to remain the full value, I don't think there would be a different rate for that special classification.

"Articles might be classed under different tariffs; and I take it different kinds of animals could be classified, draft horses, race horses, brood mares, stallions, etc.—I don't know what the reasonable classification would be—passed on by the Interstate Commerce Commission. I do not think the Amendment intended to deprive the carrier of the right to fix proper rates, based on classification, etc., except in so far as that classification was based upon the actual value of specific, individual things shipped, which was no longer to be permitted in my judgment.

"That conclusion is in accordance with the various decisions.

(Citing same.)"

(Trans., pp. 38, 39.)

And the District Judge upon the same subject, when he later ruled on the Express Company's motion for a directed verdict, said:

"The motion last made by the defendant for a directed verdict must be overruled. I see no reason to change my conclusion as to the effect of the Cummins Amendment. And in addition to what I have heretofore said on that point, I overlooked saying that in support of the view that after the adoption of the Cummins Amendment and before the amendment of 1916, there could not be rates based merely upon values, it appears that such an amendment to the Cummins Amendment was actually suggested, and was recommended by the Senate Committee on Interstate Commerce; which recommended an amendment, before the Cummins amendment was finally passed, which incorporated words giving the Interstate Commerce Commission power to establish rates varying with the value agreed upon, which amend-

ment was not adopted; thus indicating positively, it seems to me, the intention of Congress that such rates should not be permitted under the Cummins Amendment as it was adopted—almost an irresistible inference to that effect from the action of Congress itself." (Trans., p. 39.)

We respectfully submit that the above-quoted views of the District Judge in regard to the right of the carrier to establish rates based upon value as declared by the shipper, while the Cummins Amendment of March 4, 1915, was in effect in unmodified form, are manifestly correct in view of the plain language of said Amendment, and particularly of the language of the *proviso* thereto declaring (as the only case in which such practice would be permissible) that if the goods were hidden from view by wrapping, boxing or other means, and the carrier is not notified as to the character of the goods,

"the carrier may require the shipper to specifically state in writing the value of the goods . . . *in which case* the Interstate Commerce Commission may establish and maintain rates for transportation dependent upon the value of the property shipped, as *specifically stated in writing by the shipper.*" (Italics ours.)

Post, p. 68.

The District Judge was also correct in stating that the Senate Committee on Interstate Commerce recommended an amendment before the Cummins Amendment was finally passed, which amendment would have incorporated words giving the Interstate Commerce Commission power to establish rates varying with the value agreed upon, which recommendation was not adopted—thus indicating positively, as the District Judge thought, the intention of Congress that such rates should not be permitted under the Cummins Amendment as it was adopted. For convenience of the Court we quote the following from the report of the Senate Committee on Interstate Commerce referred to:

"There are some commodities which from their very nature the value of them can not be known to the carrier, and is peculiarly within the knowledge of the shipper. The carrier is compelled to rely upon the representations as to value made by the shipper. We have, therefore, recommended the adoption of an amendment providing that where the Interstate Commerce Commission has already authorized rates based upon value as represented by the shipper, or where the Commission shall hereafter do so, the liability

for loss or damage caused by the carrier shall be limited to the value as thus represented."

Report No. 407 in respect of Senate Bill No. 4522; 63d Cong., 2d Session.

Said proposed amendment was voted down and the *proviso* in question was adopted instead, in the language in which said proviso was finally incorporated in the Act, upon motion of Senator Reed of Missouri.

Cong. Record; Senate, 63d Cong., 2d Session., Vol. LI, June 4, 1914, p. 9783.

As showing that the District Judge was correct in his view that the rejection by the Senate of the proposed amendment to the Cummins Amendment (as introduced) allowing rates to be based on value in respect of certain commodities "which from their nature the value of them cannot be known to the carrier and is peculiarly within the knowledge of the shipper." was deliberately intended to prevent the making of rates based on value as declared by the shipper (when the goods were not concealed from view), and that this was intended to be accomplished as to all commodities not concealed, including race horses—we quote the following from the debate in the Senate preceding the action of the Senate in striking out the proposed Committee amendment and adopting in lieu thereof the language of the proviso as proposed by Senator Reed, as same became finally incorporated in the Act:

"MR. CUMMINS: I want to reply, however, to the Senator from Missouri. The subcommittee has given this matter a great deal of thought; we had long hearings upon the subject. The very thing that the Senator from Missouri thinks might be done, or ought to be done, I think is provided for here. The Interstate Commerce Commission is given authority to take *certain things* out of the prohibition of the statute if it grants express authority to make a rate based on value declared in writing. That is just what is done.

Let me suggest why that is necessary. Take a Kentucky race horse worth \$25,000 which is delivered to the railroad company for shipment. The railroad company will not take the horse for anything like a reasonable or payable rate unless there is an agreement with regard to the amount of recovery. If the railroad company is held to be the insurer of that animal to the extent of \$25,000, the rate becomes so high that shipment becomes impossible, and we must allow in such cases, if the Interstate Commerce Commission au-

thorizes it, a recovery based upon declared value in order to secure a transportation rate that the shipper can pay and still accomplish his purpose.

I think if the Senator from Missouri will look further into the particular part of the amendment he is considering he will find that the very thing that he wants to accomplish is accomplished by the amendment."

Cong. Record, Senate, 63d Cong., 2d Session. June 2, 1914, p. 9624.

It was after the above that the Senate took its action rejecting the proposed Committee amendment and adopting the language of the *proviso* in question as it finally became incorporated in the Act.

We have already herein referred to the proceedings in the Senate, demonstrating that the Cummins Amendment of March 4, 1915, was intended to prevent the carrier from doing the very thing sought to be accomplished by the Express Company in the instant case.

Ante, pp. 24; 37-44.

What the Court of Appeals of the Sixth Circuit in the instant case said upon the subject under discussion is contained in the third foot-note to its opinion, as follows:

"We have assumed, for the purposes only of this opinion, but without so deciding, that it was competent for defendant to make varying rates for carriage, dependent upon the value of the shipment so long as no attempt was made to *limit liability below the actual loss, damage or injury suffered.*" (Trans., p. 50.)

But, of course, there is no rate question involved in the instant controversy; and the effect of the language of the *proviso* in question as contained in the Cummins Amendment of March 4, 1915, in allowing rates based upon value in cases where the goods are hidden from view by wrapping, boxing or other means, is immaterial in the instant case. What the Court of Appeals said on this subject, as contained in the second foot-note to its opinion, is manifestly correct:

"The amendment contained a proviso permitting the carrier to require the shipper specifically to state the value of the goods when hidden from view by wrapping, boxing or other means, and relieving the carrier from liability beyond the amount so stated. But this proviso has, of course, no relation to the case under consideration." (Trans., p. 50.)

And the fact that the later Act of Congress, of August 9, 1916, C. 301, 39 Stat., 441 (hereinbefore quoted—Ante., p 26), was passed, giving to the Interstate Commerce Commission power to allow rates to be based on value in cases where the goods were not hidden from view—emphasizes, we submit, the correctness of the view of the District Judge below. This Act of August 9, 1916, was the Act before this Court for construction in the recent case of *American Railway Express Co. v. Lindenburg*, decided January 8, 1923, Adv. Opinions No. 7, 67 L. Ed., 227.

It will be noted that the Court of Appeals in the instant case, as we have before shown, assumed for the purpose of its opinion, but without so deciding, that it was competent for defendant to make varying rates for carriage dependent upon the value of the shipment—"so long as *no attempt was made to limit liability below the actual loss, damage or injury suffered.*" (Trans., p. 50.)

We submit, of course, that it is immaterial in the instant case whether the view of the District Judge or the view of the Circuit Court of Appeals in respect of the above matter is the correct view; and this is demonstrated by the fact that neither Court found it necessary to decide, and expressly left undecided, this question.

That the view of the District Judge to the effect that under the Cummins Amendment of March 4, 1915, it would not be permissible for the carrier to make rates varying with the value of the property shipped, except when same was concealed from view by wrapping or boxing was correct; and that it was the plain purpose of the Cummins Amendment of March 4, 1915, unconditionally to impose upon carriers liability for full actual loss caused by the carrier, except where the goods were hidden from view by wrapping or boxing, and the carrier was not notified as to the character of the goods—appears from the Report of the Senate Committee on Interstate Commerce recommending for passage the Amendatory Act of August 9, 1916, which gave to the Interstate Commerce Commission power to permit rates based on value, except as to "ordinary livestock." We quote the following from said Report of the Senate Committee on Interstate Commerce, recommending for passage said Amendatory Act of August 9, 1916:

"The proposed legislation is an amendment of the Act of March 4, 1915, commonly called the Cummins Amendment.

That Amendment was *designed to impose upon carriers liability for full actual loss, damage, or injury, to property transported notwithstanding any limitation of liability or recovery or representation or agreement as to value.* The Cummins Amendment as reported by this committee contained a proviso making certain exceptions in its application. The proviso reported by the committee was *stricken out* on the floor of the Senate and another substituted in its stead and in that form became a law."

"The bill herewith reported has nothing whatever to do with rates on transportation; that is to say, it does not prescribe the compensation which carriers may charge for service. It reenacts the Cummins Amendment with the *modifications* above suggested. Its purpose is to restore the law of *full liability* as it existed prior to the Carmack Amendment of 1906, so that when property is lost or damaged in the course of transportation under such circumstances as to make the carrier liable recovery is had for full value or on the basis of full value. From this general rule there is excepted, first, baggage carried on passenger trains. This is done for obvious reasons. Second, other property except ordinary live stock, with respect to which the Interstate Commerce Commission has fixed or authorized affirmatively a rate dependent upon value, either an agreed or a released value. When the commission has fixed or authorized such a rate the value agreed upon or released and necessarily stated by the shipper is not to be held as a representation of value under Section 10 of the Interstate Commerce Act. With respect to ordinary live stock as defined in the bill *there can be no rate dependent either upon agreed or released value*, and in the event of loss or damage the carrier must respond for the *actual value of the property*. The carrier will be permitted to make such a rate on ordinary live stock as will compensate for the service, including liability, *but the rate can not vary according to the value of each animal* that may be loaded into a car. There will remain the right on the part of the carrier to classify different kinds of animals within the definition of ordinary live stock, but when so classified there can be no lawful *variance in rates* because one carload of such animals may be *more valuable* than another.

"The committee thinks it proper to say that in the preparation of the amendment to S. 3069 it has had the benefit of the advice of a member of the Interstate Commerce Commission and that the recommendation of the commission has been adopted."

Senate "Report No. 394," 64 Cong., 1st Sess., April 27, 1916.

The Very Language of the Cummins Amendment of March 4, 1915, Answers Every Contention of Plaintiff in Error in This Case.

We have hereinafter, for the convenience of the Court, set out the Cummins Amendment of March 4, 1915, in full (*Post*, pp. 67-69). We have endeavored to show the purposes for which this Act of Congress was passed, and the abuses which it sought to correct; and we have shown, we submit, that the Congress understood, and the Courts have recognized, that this Amendment was passed to obviate the state of the law resulting from the construction given by this Court in the *Croninger case* (226 U. S., 491), to the Carmack Amendment; and was passed for the purpose of *cutting in behind* all the questions sought to be made by our adversaries in the case at bar.

It will be noted, in the first place, that the Cummins Amendment of March 4, 1915, is leveled against any common carrier, railroad or transportation company subject to the provisions of the Act—"receiving property for transportation" in interstate movements, or from any point in the United States to a point in an adjacent foreign country.

The Express Company in the case at bar admittedly "received"—indeed, it is stipulated that it "received" Mr. Darden's five race horses for transportation from Latonia, Ky., to Windsor, Canada. (Trans., pp. 35.)

Said Cummins Amendment next provides that any such common carrier or transportation company "receiving property for transportation" in the cases specified in the Act, shall issue a receipt or bill of lading therefor; and then the Act declares that such carrier "shall be liable to the lawful holder thereof for any loss, damage or injury to such property, caused by it"—or any connecting carrier to which it is delivered.

Admittedly in the case at bar the destruction of plaintiff's five race horses was caused by the *negligence* of the Express Company and its agent, the transporting Railroad Company to which these horses were delivered in their through movement from Latonia, Ky., to Windsor, Canada.

And after declaring liability as set out above (and in sub-

stantially the same language employed in the Carmack Amendment), the Cummins Amendment goes far beyond the Carmack Amendment, by declaring that

"no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier . . . from the liability hereby imposed."

And then, lest the intent of Congress might still not be perfectly plain, the Cummins Amendment then proceeds to declare that any such common carrier so *receiving* such property for such transportation—

"shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the *full actual loss, damage, or injury* to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass."

And lest it still might not be plain, the Amendment then declared that such liability for "full, actual loss," etc., should exist—

"notwithstanding any *limitation of liability* or *limitation of the amount of recovery* or *representation* or *agreement as to value* in any such receipt or bill of lading or in *any contract, rule, regulation, or in any tariff* filed with the Interstate Commerce Commission; and any such limitation, *without respect to the manner or form in which it is sought to be made*, is hereby declared to be unlawful and void."

The above explicit language of the Cummins Amendment, of course, answers every contention of our adversaries in the case at bar, we submit. It expressly and pointedly answers all their contentions in regard to the "contract" of shipment, by declaring full liability against the Express Company which "received" these horses for transportation, "notwithstanding" the terms and provisions of any "contract." And this full liability is declared notwithstanding the contents or provisions of any "tariff." And this full liability is declared notwithstanding "any limitation of liability," or any "limitation of the amount of recovery," or any "representation or agreement as to value," in any "contract," rule, regulation, or in "any tariff filed with the Interstate Commerce Commission"; and the Act then declares that any such limitation "without respect to the manner or form

in which it is sought to be made is hereby declared to be unlawful and void."

What our adversaries do with a *seriousness* and a *temerity* which has always been *strange* to us, is to present insistences in this case, and review and present numerous cases decided by this court, without ever analyzing or noticing the plain and explicit terms and the specific provisions of the Cummins Amendment of March 4, 1915 passed after said decisions were rendered.

Now, while it is no doubt unnecessary and purely a work of supererogation, we feel constrained to analyze the Assignment of Errors annexed to and returned with the Writ of Error in this court; and thus make pointedly manifest how each and every one of said assignments are answered by the very terms and provisions of the Cummins Amendment.

Assignment of Errors Analyzed.

I. Our adversaries' Assignment of Error I, returned with the Writ of Error (Trans., 54), challenges the action of the Circuit Court of Appeals in refusing to reverse the District Judge below for overruling the Express Company's motion, made at the conclusion of the testimony of plaintiff below, to have the court withdraw and exclude from the jury all the evidence relating to and showing the *actual value* of the horses killed, on the ground that such evidence tends to vary the terms of the "written contract of shipment introduced by the plaintiff as evidence in this case"; and also tends to vary the written terms of the contract prescribed in the filed and published tariffs under which the shipment was made.

The obvious answer to the above assignment is that there was no written contract of shipment, and that the undisputed facts established that the Express Company's agent (Fenrock) fraudulently, and without the knowledge and consent of Mr. Darden or anyone representing him, undertook to "fix up" the alleged contract with the stated value of \$100 each for the horses, and had same signed by a man known by this agent not to represent Mr. Darden, and who told the agent he was not undertaking to represent Mr. Darden, and even this outside man did not undertake to give any information to the Express

Company's agent about the value of the horses. (Trans. pp. 19, 21, 22; 33-35.)

Another obvious answer to this assignment is that plaintiff did not introduce in evidence this alleged "written contract of shipment" for the purpose of grounding any rights thereon. This contract was never turned over to plaintiff, or any one representing him, and was never seen by plaintiff until it was introduced by defendant and marked as "Defendant's Exhibit No. 2" on the first trial below (Trans. p. 22); and said alleged "contract of shipment" which thus came to plaintiff's knowledge and access, was merely marked as "Plaintiff's Exhibit No. 2" on the last trial below for the purpose of showing same to plaintiff's witnesses and having them *disclaim* any knowledge of its contents, or that same was ever turned over to plaintiff or anyone acting for him.

Plaintiff's suit was to no degree grounded upon this written contract. Neither the original nor the amended declaration mentioned or referred to this pretended written contract at all. (Trans. pp. 1-5; 6-11.)

Plaintiff's said declarations alleged that defendant agreed to furnish and provide for this shipment of horses a first-class, two door steel or palace horse car; and set out the rate or price which the Express Company agreed to receive for the shipment; and then set out how the Express Company, after receiving said horses for transportation, *negligently* had same loaded in an old, rotten and defective car, which it negligently handled by having same placed next behind the drawing locomotive, and at the head of the train, with a long and heavy steel train coupled behind it, contrary to the usages and practices of good rail-roading. (Trans. pp. 1-5; 6-11.)

Plaintiff's suit was grounded upon the *underlying charge of negligence*, by which his horses were destroyed by the Express Company, after they had been "received for transportation" as defined in the Cummins Amendment of March 4, 1915.

Another obvious answer to the foregoing Assignment is that by the express terms of the Cummins Amendment there did not exist any authority in the Interstate Commerce Commission, or in the Express Company, to establish any rate on these horses

based on stated or declared value, since these horses were not "hidden from view," and it was not a case where the carrier was "not notified as to the character of the goods." The first proviso of the Cummins Amendment expressly declares that it is only in such cases that the carrier may require the shipper to state in writing the value of the goods, so as to limit the carrier's liability to the amount so specifically stated; and even in such case the Interstate Commerce Commission is only authorized to establish rates dependent upon value—"specifically stated in writing by the shipper."

And the *conclusive* answer to the foregoing Assignment of course, in this case—(where it is admitted that the Express Company "received" the horses for transportation from a point in Kentucky to a point in Canada, and that they were killed as the result of the *negligence* of the Express Company)—is that the Cummins Amendment declares and imposes liability for the "full actual loss, damage or injury" to such property, *notwithstanding* any limitation of liability or limitation of the amount of recovery, or representation or agreement as to value . . . in any *contract* . . . or in any *tariff* filed with the Interstate Commerce Commission." Post p. 68.

Any contention that in this sort of a case the shipper should not be allowed to prove the *actual value* of his property negligently destroyed by the carrier, is one that answers itself, in view of the terms of the Cummins Amendment.

II. Assignment of Error II returned with the Writ of Error (Trans., pp. 54, 55) challenges the action of the Circuit Court of Appeals in refusing to reverse the District Court for overruling the Express Company's motion made at the conclusion of the evidence in the District Court, to have the Court withdraw and exclude from the jury all evidence offered by plaintiff tending to show any agreement or understanding on the part of the Express Company to furnish any particular kind of car on any particular date, upon the ground that such evidence tended to vary the terms and provisions of the *published tariffs* filed with the Interstate Commerce Commission.

The evidence mentioned in the foregoing Assignment was given by the plaintiff Darden, in person, who never saw, signed, or knew anything about any alleged written contract of ship-

ment; and this evidence was offered and allowed for the purpose of establishing that the Express Company "received" the horses for transportation from a point in Kentucky to a point in Canada, so as to bring the case under the terms of the Cummins Amendment. The plaintiff below did not rely merely upon the breach of any contract to furnish a particular kind of car on a particular date for his remedy, but, on the other hand, proceeded to show the *negligent destruction* of his horses by the Express Company, and this negligence is now not denied.

And, of course, a further conclusive answer to the foregoing Assignment is that the Cummins Amendment declares full liability in this sort of a case—(where it stands established against the Express Company that the shipper's loss was "caused by it")—notwithstanding any attempted limitation of liability "or representation or agreement as to value in any contract" or "in any tariff," and declares that any such limitation "without respect to the manner or form in which it is sought to be made" shall be "unlawful and void." Post p. 68.

III. Assignment of Error III, returned with the Writ (Trans. p. 55), challenges the action of the Circuit Court of Appeals in refusing to reverse the District Judge for overruling the Express Company's motion, made at the conclusion of all the evidence, which was but a renewal of its motion made at the conclusion of plaintiff's testimony, to have the Court dismiss plaintiff's suit upon the alleged ground that plaintiff, by his own testimony, had disclosed to the Court the illegality "in the contract upon which his suit was based," in that it appeared that plaintiff shipped his horses "on a valuation which was less than actual value," contrary to the filed and published *tariffs* governing the shipment.

A conclusive answer, we submit, to the foregoing Assignment is that plaintiff's suit against the Express Company was foundationed not upon an alleged written contract of shipment, which plaintiff knew nothing about, but the *gravamen* of plaintiff's suit was the "receipt" by the Express Company of these horses for transportation from a point in Kentucky to a point in Canada, and their later destruction "caused by it" (the Express Company) as the result of its now established and admitted *negligence*; and the Cummins Amendment, in this sort of a case declares liability on the part of the carrier for the "full

actual loss" regardless of any "contract" or any "representation" as to value, or "any tariff filed with the Interstate Commerce Commission."

Post, p. 68.

Another obvious answer to the above Assignment is that this case presents logically no question of the enforcement of any "illegal contract" for the shipper's benefit. The only question presented is the "other way round"—that is, can an "illegal" contract or limitation upon value (expressly declared to be "unlawful and void" by the Act of Congress) be invoked by the Express Company to prevent the shipper from recovering his "full actual loss, damage or injury," when said Cummins Amendment of March 4, 1915, expressly gives the shipper this remedy "notwithstanding" any such contract or representation as to value, or attempted limitation of liability "without respect to the *manner or form* in which it is sought to be made."

IV. Assignment of Error IV, returned with the Writ of Error (Trans. p. 55), challenges the action of the Circuit Court of Appeals in refusing to reverse the District Judge for denying plaintiff's motion made at the conclusion of all the evidence, "to direct the jury to return a verdict for the defendant," because: (a) the plaintiff disclosed by his own testimony the illegality of the contract upon which his suit is based, in that it appeared that the horses were shipped on a valuation which was less than actual value, and this resulted in a *rebate*, contrary to the filed and published tariffs governing the shipment; and (b) because it appeared from plaintiff's declaration and the evidence offered by plaintiff that his suit was based on an alleged *oral contract* entered into between the plaintiff and an agent of the Express Company, which oral contract was contrary to the published tariffs filed with the Interstate Commerce Commission; and (c) because the contract entered into between the plaintiff and the agent of the Express Company was in violation of the statutes of the United States, and therefore illegal and void, *in that* said contract was not in accordance with the filed and published *tariffs* such as were required by the statutes governing the transportation of interstate commerce.

One answer to the foregoing Assignment would be, of course, that if there were no Cummins Amendment, and plaintiff had

actually signed a contract agreeing to a valuation of \$100.00 each for his horses, and obtained a rate based thereon, he would still have a right to recover the agreed valuation of \$100 each for said horses, and a motion to direct a verdict outright for the defendant could not have been granted at all.

Another answer to the foregoing Assignment is that plaintiff's suit was not "based" on any "alleged oral contract" nor upon the alleged "written contract of shipment"; but, on the other hand, plaintiff's suit was expressly grounded on the Cummins Amendment, which declares full liability in this sort of a case where the shipper's property was "received" by the carrier for transportation from a point in the United States to a point in an adjacent foreign country, and was then *negligently* destroyed; and which declares such full liability "notwithstanding" any limitation of liability, or limitation of the "amount of the recovery," or representation or agreement as to value in any "contract" or in any "tariff filed with the Interstate Commerce Commission"; and declares that any such limitation "without respect to the manner or form in which it is sought to be made" shall be "unlawful and void."

Post p. 68.

As to the contentions in the above Assignment that plaintiff's suit should have been dismissed because based on an alleged "oral contract" of shipment, which was not permissible under the tariffs filed with the Interstate Commerce Commission, and therefore illegal and void—it is only necessary to call your Honors' attention to the language of the Cummins Amendment making the carrier liable for full actual loss to the one to whom the carrier should have issued a written receipt or bill of lading,—“whether such receipt or bill of lading has been issued or not.”

Post, p. 68.

V. Assignment of Error V, returned with the Writ of Error (Trans. p 55), challenges the action of the Circuit Court of Appeals in refusing to reverse the action of the District Court in denying the Express Company's motion for a new trial.

By the motion for a new trial the Express Company merely brought forward and preserved its rights to continue to rely

upon the alleged errors of the trial judge in overruling the motions made by the Express Company in the Court below, and made the basis of the first four Assignments of Error.

It is to be observed that ground (d) under Division IV of the motion for a new trial (Trans. p. 41) was not urged in the Circuit Court of Appeals, but on the other hand was omitted from the specification of error under Assignment IV in that Court. (Trans. p. 43.)

The Express Company thus abandoned, after the verdict in the District Court, its contention that the evidence did not sustain the charge that plaintiff's property was negligently destroyed; and accordingly the Bill of Exceptions did not contain the evidence introduced before the District Judge and the jury upon this issue of negligence; and so the Express Company is now making no contention that the verdict of the jury against it upon the issue of negligence was not sustained by the proof. It therefore results that there is nothing in Assignment of Error V (Trans. p. 55) that is not covered by the previous Assignments already noticed.

Assignments of Error VI to IX, both inclusive (Trans. pp. 55, 56) present nothing that has not already been disposed of in our analysis of the previous Assignments.

In fact in the Circuit Court of Appeals the Express Company's sole ultimate contention was that the shipping contract was wholly void and unenforceable by plaintiff, because it involved the giving and acceptance of a rebate from defendant's usual tariff rates, in violation of the Interstate Commerce Act. That Mr. Darden's horses had been killed as the result of the negligence of the Express Company, was not challenged in that Court. As to this the opinion of the Circuit Court of Appeals states:

"In this court the conclusion that such killing was proximately due to the negligence of the express company is not challenged—defendant's sole ultimate contention on the merits being that the shipping contract was wholly void and unenforceable by plaintiff because it involved the giving and acceptance of a rebate from defendant's usual tariff rates, in violation of the provisions of the Interstate Commerce Act." (Trans. p. 49.)

We submit that the Circuit Court of Appeals correctly disposed of the above mentioned "ultimate contention" of the Express Company in that Court, for all the reasons set out in the learned opinion of that Court. (Trans. pp. 49-53.)

Our adversaries always strangely overlook, it seems to us, the proposition that plaintiff's suit was not grounded upon any effort to recover on any contract of shipment, as a contract. Plaintiff's suit was primarily grounded upon the underlying charge that his horses had been negligently destroyed by the Express Company, after said company had "received for transportation" said horses; and consequently that plaintiff Darden was entitled to prove and recover the full actual loss, damage or injury to the property shipped, as the Cummins Amendment of March 4, 1915, plainly declared should be done.

The underlying fallacy in the Express Company's contention is plainly revealed, it seems to us, in the insistence which it has continued to make, and repeats in its brief supporting its petition for Certiorari filed in this Court, as follows:

"Neither the Carmack nor the Cummins Amendment creates any thing; both are negative, and merely *prohibit* a contractual change of common law liability—one as to distance, and the other as to amount."

Petitioner's Brief for Certiorari, p. 20.

Of course the Cummins Amendment is not merely "negative." Of course the amendment does not merely prohibit a "contractual change" of common law liability.

The Cummins Amendment, of course, in so many words, affirmatively declares and enacts that the carrier shall be liable to the shipper for the "full actual loss, damage or injury" caused by it; and that no "contract . . . or other limitation of any character whatsoever, shall exempt . . . from the liability hereby imposed"; and then said Act of Congress repeats the declaration of liability by the carrier for such "full actual loss, damage or injury" to such property, caused by it—"notwithstanding" any limitation of liability or limitation of the amount of recovery or "representation or agreement as to value" in any receipt or bill of lading, or in any contract, rule, regulation, or in "any tariff filed with the Interstate Commerce Commission"; and then said Act declares that—

"Any such limitation, *without respect to the manner or form in which it is sought to be made*, is hereby declared to be unlawful and void," etc. (Post p. 68.)

How can our adversaries be heard to insist that this language of the Cummins Amendment merely prohibits a "contractual change" of common law liability? What the Act does is to declare and enact liability for the "full actual loss, damage or injury," and then expressly declare that by no "contract" or any other device can such full liability be relieved against or defeated.

We repeat that it has always seemed strange to us that our learned adversaries insist upon presenting their contentions in this case as though the Cummins Amendment of March 4, 1915, in unmodified form, had not been in force when this injury occurred, and without ever analyzing or even noticing the plain and specific provisions and declarations of said Act of Congress.

If the Cummins Amendment of March 4, 1915, be valid and constitutional legislation, its plain and explicit terms extract all *merit* and *substance* from any insistence covered by the Writ of Error,—we respectfully submit.

The Cummins Amendment of March 4, 1915, Is Constitutional.

We do not understand that our adversaries, or any other litigant, have ever quite screwed up their courage to the point of attacking the constitutionality of the Cummins Amendment. The nearest our adversaries ever got to such an attack was a statement on page 37 of their brief in the Court of Appeals below, where they said:

"The inherent right to base rates on value is as old as the right of common carriers to charge for transporting and insuring property. This *right* needed no 'authority' from Congress; the serious doubt is whether Congress could 'prohibit' this ancient practice."

Just why our adversaries thought there was any "serious doubt" about the power of Congress to pass this amendment is a matter about which they do not enlighten us. They fail to point out any article or provision of the Constitution which they

think was violated when this Act was passed, and consequently they are in the attitude of making no *legal* attack upon its constitutionality.

Any attack upon the constitutionality of the Cummins Amendment would appear completely to be answered by the language of the Court in dealing with the Carmack Amendment in the case of *Adams Express Company v. Croninger*, 226 U. S., 491-500, where the Court said:

"That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to *regulate contracts* between the shipper and the carrier of an interstate shipment by *defining the liability* of the carrier for loss, delay, injury or damage to such property, *needs neither argument nor citation of authority.*"

226 U. S., 500.

And as we have hereinbefore pointed out, before the passage of the Carmack Amendment this Court had uniformly sustained State statutes prohibiting the making of limited liability contracts by common carriers with their shippers, and declaring liability by such carriers for the full actual value of and damages to property lost, injured or destroyed in transit.

Ante, pp. 23, 37.

So we respectfully submit there is no merit in any *hint* which our adversaries undertake to throw out as to any alleged unconstitutionality of the Cummins Amendment as construed and administered in the Courts below in the instant case.

The Opinion of the Circuit Court of Appeals in This Case

The opinion of the learned Circuit Court of Appeals for the Sixth Circuit in the instant case is in the record. (Trans. pp. 48-53.)

The opinion of the Circuit Court of Appeals in this case, after reciting the admitted facts; reviewing the state of the law when the Cummins Amendment of March 4, 1915 was passed; noticing and quoting the plain language of said Act of Congress; and referring to and quoting the language of this Court in *Chicago etc. Ry. Co. v. McCaull-Dinsmore Co.*, 253

U. S., 97-100,—then proceeds to dispose of the Express Company's contention that the mere giving and receiving of a rebate from the applicable tariff rate rendered the contract of shipment in this case void and unenforcible. (Trans. pp. 48-50.)

The Court of Appeals in its said opinion then states that whether or not the contract of shipment is non-enforcible "depends upon the public policy of the United States in that respect, as evidenced by its statutes and the decisions of its courts"; and the Court then proceeds to review numerous decisions, and particularly reviews and quotes from the opinion of this Court in *Merchants etc. Co. v. Ins. Co.*, 155 U. S., 368; 387, 388, opinion by Mr. Justice Jackson. (Trans. pp. 50-53.)

The Court of Appeals in its said opinion in this connection pointed out how this Court, in *Merchants etc. Co. v. Ins. Co.*, 151 U. S., 368; 387, 388, *supra*, had quoted with approval the holding of the State Supreme Court; and referring to the opinion of this Court in that case, the Circuit Court of Appeals in the instant case, said:

"The court (pp. 387, 388) quoted with approval the holding of the state supreme court that assuming 'that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received. . . . The law makes such agreements as to rebate, etc., void but it does not make the contract of affreightment otherwise void, and we think there is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability when it made such contract in connection with that for receipt and transportation of freight. *Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract as to rebate would be void . . . and could not be enforced; but we think the shipper could nevertheless recover for loss of his freight through the carrier's negligence. . . . No different construction has yet been put upon the Interstate Commerce law so far as we are advised, and we decline to give it any other.*' The Supreme Court added its own express statement as follows: 'There is nothing in the Interstate Commerce Law which vitiates bills of lading, or which, by reason of such allowance . . . if actually made, would invalidate the contract of affreightment or exempt the railroad company from liability on its bills of lading.' True, this de-

cision was concerned with the original interstate commerce act of 1887 (Feb. 4, 1887; 24 St. C. 104, pp. 379, et seq.), which did not punish the shipper for accepting or receiving rebates; but it did, in express terms, prohibit unjust discrimination in rates, declared such discrimination unlawful, required the carrier to file copies of its schedules of rates, made it unlawful for the carrier to charge, collect or receive a greater or less compensation than provided in the published schedules, and for willful violation of the act made the carrier guilty of a misdemeanor. Plainly, therefore, such rebates were then not only contrary to the public policy of the United States, but were positively illegal (see *Armour v. United States*, 209 U. S. at p. 69). That the shipper was not punishable does not alter the case in this respect.

"We are not cited to, nor have we found, any decision of the Supreme Court which, in our opinion, as applied to the facts of the instant case, contravenes or discredits the decision in the cotton compress case just cited."

(Trans., pp. 52, 53.)

The case at bar demonstrates the truth and foresight in the language of this Court in the 151 U. S. case *supra* (p. 388) when it said that "*such a construction*" (one that would excuse a carrier from all liability when it made a contract for a rebate in connection with a contract for receipt and transportation of freight) "*would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight.*"

The entire effort of the Express Company's agent (Fenrock) in filling out the pretended contract of shipment which Mr. Darden never saw and knew nothing about, was the fraudulent manifestation of his principal's preference for a rebate to liability for the freight it received for transportation.

Upon the grounds upon which the learned Circuit Court of Appeals rests its opinion and holding, the same is obviously sound, we submit. But we respectfully call attention of your Honors to the language of the Cummins Amendment of March 4, 1915, wherein liability for full actual loss, damage or injury is declared—

"notwithstanding any limitation of liability or limitation of the amount of recovery, or representation or agreement as

to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commisison; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void."

The above language is very plain. It cannot be misunderstood or misconstrued by anyone, we respectfully submit.

All the provisions and requirements of the Act of Congress in respect of penalties for undue discriminations, etc., are left untouched by the Cummins Amendment of March 4, 1915.

The public policy of our nation was conclusively declared by the terms of said Cummins Amendment of March 4, 1915. If its terms are to any degree inconsistent with previous Acts of Congress, then, nevertheless, its terms and provisions are clear and unmistakable, and previous inconsistent enactments could not control the instant controversy.

For all the reasons stated, we respectfully submit that our motion to dismiss the writ of error, or, in the alternative to affirm the judgment and holding of the Circuit Court of Appeals, should be sustained.

Respectfully submitted,

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APPENDIX "A."

The Cummins Amendment of March 4, 1915.

The original Interstate Commerce Act of February 4, 1887, 24 Stat., 379 c. 104, was extensively amended by the Act of June 29, 1906, 34 Stat., 584 c. 3591, known as the Hepburn law. In Section 7 of this last mentioned act of 1906 there was incorporated an amendment, known as the Carmack Amendment, to Section 20 of the original Interstate Commerce Act of 1887.

For ready reference, the Carmack Amendment can be found printed in the lower margin of the report of the case of *Adams Express Company v. Croninger*, 226 U. S., 503.

The Cummins Amendment of March 4, 1915, effective 90 days after its passage, was in the form of an Amendment to the Carmack Amendment to the Hepburn Act, and said Cummins Amendment in its *entirety* is as follows:

The Cummins Amendment.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That so much of Section 7 of an Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February 4, 1887, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29, 1906, as reads as follows, to-wit:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State, shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," be, and the same is hereby, amended so as to read as follows, to-wit:

"That any common carrier, railroad, or transportation company, subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided, however,* That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided, further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of ac-

tion which he has under the existing law: *Provided, further*, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however*, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.

"SEC. 2. That this Act shall take effect and be in force from ninety days after its passage."

"Approved March 4, 1915."

38 Stat. L., 1196, 1197.

Fed. St. Anno. Sup., 1916, pp. 124, 125.

WM. R. STANSBURY
CLERK

IN THE
United States Supreme Court

OCTOBER TERM, 1922

No. 865

ADAMS EXPRESS COMPANY, *Plaintiff in Error*

vs.

W. W. DARDEN, *Defendant in Error*

**BRIEF IN REPLY TO MOTIONS TO DISMISS
OR AFFIRM**

**MAXWELL & RAMSEY,
BASS & SIMS,
WILLIAM L. GRANBERY,**
Attorneys for Plaintiff in Error

IN THE

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OCTOBER TERM, 1922

No. 865

ADAMS EXPRESS COMPANY, *Plaintiff in Error*

vs.

W. W. DARDEN, *Defendant in Error*

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN REPLY TO MOTIONS TO DISMISS OR AFFIRM

May It Please Your Honors:

Having filed a petition for a writ of *Certiorari* now pending, and having expressed therein our view of the questions presented upon the record, we think it unnecessary to again burden the Court with the same or similar argument and brief, in reply to the

motions made by Defendant in Error to "dismiss or affirm."

Motion to Dismiss

The writ of error was sued out, and thereafter a petition for *Certiorari* filed, so there could be no question of the jurisdiction of this Court to hear and determine what we conceive to be serious and important questions affecting interstate commerce, even though we believed a writ of error permissible under the Judicial Code.

Section 241 of the Judicial Code confers upon this Court jurisdiction to review cases determined in the Circuit Court of Appeals where the judgment of that Court is not made final.

Section 128 makes the judgment of the Circuit Court of Appeals final only where original jurisdiction depended "entirely" upon diverse citizenship.

Sub-section 8 of Section 24 gives to District Courts jurisdiction "of all suits and proceedings arising under any law regulating commerce"

Obviously, under these sections of the Judicial Code, the original jurisdiction of the District Court determines the jurisdiction of this Court upon this writ of error.

That the original jurisdiction of the District Court involved "proceedings arising under" the Commerce Act is, we think, shown by an excerpt from the declaration:

"Defendant Adams Express Company, a citizen and resident of the State of New York as aforesaid, is an express company which, as a common carrier for hire, makes contracts for

the shipment and transportation by it, and ships property through many states of the United States; and defendant The Pennsylvania Railroad Company, a citizen and resident of the State of Pennsylvania as aforesaid, as a common carrier of freight and passengers for hire, owns and operates a steam commercial railroad between, into and through several states of the United States; and both defendants Adams Express Company and the Pennsylvania Railroad Company, on July 7, 1915, and for a long time prior thereto, were common carriers, railroads or transportation companies subject to the provisions of an Act of the Congress of the United States of America entitled 'An Act to Regulate Commerce,' passed February 4, 1887, and other Acts of said Congress amendatory thereof, and particularly an Act passed March 4, 1915." (Trans., p. 1.)

Not only did the declaration set up a case involving "proceedings arising under" the Commerce Act, but it specifically called attention to that portion of the Act, which is applicable to this controversy, to-wit: "An Act passed March 4, 1915," a proper construction of which determines the controversy in this case.

From the inception of this case to the present time the paramount issue has been, and is now, a proper construction of the Act of March 4, 1915, known as the first "Cummins Amendment"; and it is the shield behind which Defendant in Error claims immunity from his "unlawful" conduct.

For these reasons we think the original jurisdiction of the District Court did not depend "entirely" upon diverse citizenship, and therefore the judgment

of the Circuit Court of Appeals is not made final by the Judicial Code, and a writ of error to that Court is authorized.

L. & N. R. Co. v. Rice, 247 U. S., 201.

And finally it may be said defendant in error has from the filing of his complaint in this action contended the "Cummins Amendment" to the Commerce Act authorized recovery against plaintiff in error, but now denies the Act was sufficiently involved to confer jurisdiction upon the Court. We submit he should not be allowed to hold to both.

Motion to Affirm

Counsel for defendant in error has filed a brief and argument of more than fifty pages to convince the Court "the questions on which the decision of this cause depends are so frivolous as not to need further argument."

The material and undisputed facts are these: An *experienced* shipper delivered to a carrier for transportation in interstate commerce, five race horses worth more than \$60,000, and paid \$82.50, the rate on horses of the value of \$500, when the lawful rate on these horses, as shown in the filed tariffs and in the shipping contract prescribed by the Commerce Commission, was more than \$600. The horses were killed in transit, and the shipper in an action against the carrier has disclosed in his own evidence to the Court the facts constituting this unlawful rebating; and the courts have enforced this contract for his benefit—the trial court because of a construction of the

"Cummins Amendment," and the appellate court because, in its opinion, this *promoted* public policy.

Counsel for the shipper, in a motion to affirm, insists the "Cummins Amendment" affords protection to the shipper guilty of the conduct hereinabove stated; and also insists public policy is *promoted* in aiding the shipper to complete and carry into effect the very thing which it is the "great purpose" of the Commerce Act to suppress and prevent; and further insists contrary contentions "are so frivolous as not to need further argument."

The Cummins Amendment

Counsel for the shipper say the carrier is liable because the "Cummins Amendment" (Act of March 4, 1915) makes the carrier liable "for the *full actual* loss, damage or injury to such property *caused by it*"; and "*no contract, receipt, rule, regulation or other limitation of any character whatsoever* shall exempt such common carrier, railroad or transportation company from the liability hereby imposed." (Brief p. 6.) The "Cummins Amendment" amends the "Carmack Amendment" (34 Stat. 595) in these respects only: The Carmack Amendment says the initial carrier is liable "for any loss, damage, or injury to such property caused by it"; while the "Cummins Amendment" substitutes "full actual" loss for "any" loss. Again, the "Carmack Amendment" says "no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed"; while the "Cummins Amendment" merely adds after

the word "regulation," the words, "or other limitation of any character whatsoever."

The purpose of the "Cummins Amendment" was to destroy the right of carriers and shippers to *contract* for a limitation of the *amount* of liability, in the event of liability, which right had been sustained in *Adams Express Co. v. Croninger*, 226 U. S., 502.

The Congress was not regulating liability, but denying the carrier the right to *limit* the *amount* of its liability by *contract* with the shipper. It was not *increasing* common law liability, but was *prohibiting* contracts *decreasing* the *amount* of common law liability.

After the passage of the "Cummins Amendment" the Commerce Commission, after a hearing and consideration, ordered carriers to adopt a new form of shipping contract, in which there is no right to limit by contract the amount of the carrier's common law liability, and this is the form of contract used in this case. (Trans., p. 29.)

In re: Cummins Amendment, 33 I. C. C., 682.

And although we have adopted the Commerce Commission's construction of the "Cummins Amendment," our adversaries say our contention is "so frivolous as not to need further argument."

Obviously, if we were relying upon a contractual limitation of the amount of our liability, if that was our defense, we would be defeated by the plain language of the "Cummins Amendment." That was the situation in the case reported in:

McCaull-Dinsmore Co. v. Chicago etc. Ry. Co.,
252 Fed. 664;

Chicago etc. v. McCaull-Dinsmore Co., 260
Fed. 835;
Chicago etc. v. McCaull-Dinsmore Co., 253
U. S. 97.

There a carrier sought by contract to *limit the amount* of its liability to the value of the shipment at the point of origin, instead of the value at destination—the common law rule. That was a clear case forbidden by the “Cummins Amendment,” and the Court held no convenience or other excuse could overcome the plain meaning of the “Cummins Amendment,” which forbids a contractual limitation of the amount of the carrier’s “common law” liability. And this is the extent of the decisions of the Courts in that case.

Plaintiff in error does not claim any limitation of its liability under the shipping contract, but insists defendant in error has set up an illegal contract and is asking the court to enforce it for his benefit.

Defendant in error having violated the filed and published tariffs, and having received a rebate from these tariffs, which is made “unlawful” and also a misdemeanor, and having been forced to disclose these facts, in an effort to make out his case, now seeks protection against such “unlawful” conduct under the “Cummins Amendment.”

The “Cummins Amendment” does not repeal any provision of the Commerce Act; it merely *adds* to that Act by prohibiting a “limited liability contract” for certain kinds of property, which this Court, in *Adams Express Co. v. Croninger*, 226 U. S. 502, had held to be lawful.

The "Cummins Amendment" only applies to certain kinds of property, and obviously cannot be construed to repeal those Sections of the Commerce Act dealing with rebating as to *some* kinds of property and leaving them in force as to *other* kinds of property.

The Shipping Contract

Counsel for the shipper insist they are not suing on any shipping contract, and are not bound by the shipping contract prescribed by the Commerce Commission and made a part of the tariffs.

The "Carmack Amendment," and repeated in the "Cummins Amendment," requires the carrier to issue "a receipt or bill of lading therefor," when it receives property for transportation, and this is one of the "significant and dominating features" of those amendments.

Adams Express Co. v. Croninger, 226 U. S. 502.

The form of the "receipt or bill of lading therefor" is prescribed by the Commerce Commission and made a part of the filed and published tariffs. (Trans. pp. 22-23.)

Neither the shipper nor carrier may vary the terms of this contract, and it measures the rights and remedies of each party to the contract; and any matter not contained in this contract is void and unenforceable.

Chicago etc. R. Co. v. Kirby, 225 U. S. 155;
Blish Milling Co. v. Railroad, 241 U. S. 197.

Whether defendant in error actually saw or understood the terms of the shipping contract, is not material, since the law *requires* him to know the filed tariffs.

Southern Ry. v. Prescott, 240 U. S. 632;
Boston & Maine Ry. v. Hooker, 233 U. S. 97;
Penn. R. R. Co. v. Coal Co., 230 U. S. 197;
Kansas City R. Co. v. Carl, 227 U. S. 639.

These tariffs and the shipping contract, prescribed by the Commerce Commission and made a part of the tariffs, required, among other things, the shipper to pay a rate graduated by the value of the shipment—not for the purpose of *limiting* the amount of the liability of the carrier, but to compel the shipper to pay the lawful transportation charge prescribed by the Commission.

When the shipper only paid the rate applicable to minimum value, he obviously *knew* that rate was not the lawful rate for the shipment. Undervaluation of the shipment was probably the most prevalent method of securing a rebate, to prevent which was the “great purpose” of the Commerce Act.

N. Y. Ry. Co. v. I. C. C., 200 U. S. 361.

Hence our insistence is, the shipper is bound by the shipping contract, and if it is made to appear that he has violated that contract, and received a rebate, contrary to the provisions of the Commerce Act prohibiting rebating and making it “unlawful,” the “Cummins Amendment” may not be invoked to make that “lawful” which the Commerce Act has declared to be “unlawful.” If a shipper violates the

plain provisions of the lawful tariffs, the "Cummins Amendment" should afford no protection against such conduct.

The Effect of Rebating

We respectfully submit this case turns upon this Court's view of what effect shall be given to a contract under which the shipper has received a rebate. The Circuit Court of Appeals thinks public policy requires the Court to ignore the unlawful conduct of the shipper and enforce the contract for his benefit; while we, with all proper respect for the opinion of that learned Court, think this view contrary to the general law governing illegal contracts, and especially contrary to the decisions of this Court construing the Commerce Act.

We think it clear the shipper must rely upon the shipping contract prescribed in the tariffs,—that being the only *lawful* contract upon which property may be received for shipment in interstate commerce.

Chicago & Alton R. Co. v. Kirby, 225 U. S. 155;

Blish Milling Co. v. Georgia R. Co., 241 U. S. 197.

When, therefore, the shipper, basing his action, as he must, upon this prescribed shipping contract, discloses to the Court his violation of the Commerce Act, that he has obtained a rebate contrary to the contract he sues upon, and is compelled to make this disclosure as the foundation of his recovery, we respectfully submit the Court ought not to aid him in the enforcement of such a contract.

The Commerce Act prevents giving or receiving a rebate in interstate shipments; and it prohibits giving or receiving free transportation on interstate journeys, with exceptions not here material. The underlying principle is the same in both sections of the Commerce Act.

This Court has held in *Illinois Central R. Co. v. Messina*, 240 U. S. 394, a non-paying passenger, violating this law, may not maintain an action for personal injuries received on such journey, *because* of his unlawful conduct. And we think there can be no distinction on principle between a passenger and a shipper violating this law, and seeking to enforce rights growing out of such unlawful conduct.

In *Missouri etc. Co. v. Harriman Bros.*, 227 U. S. 671, the court says:

“If he (shipper) knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination *forbidden* and made *unlawful* by the 1st section of the Elkins Act of Feb. 19, 1903 (32 Stat. at L. 847).”

The court refers to *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, where it is held a contract illegal under the Interstate Commerce Act is unenforceible, and specifically holds an agreement to transport a shipment in a special way, not being a part of the filed and published tariff, is illegal and unenforceible.

In *Great Northern R. Co. v. O'Connor*, 232 U. S. 515, the court says:

“If on the other hand, there are alternative rates based on value, and the shipper names a

value to secure a lower rate, the carrier, *in the absence of something to show rebating* or false billing, is entitled to collect the rate which applied to goods of that class."

In *Atchison R. Co. v. Robinson*, 233 U. S. 180, the court, after citing this and other cases, says:

"We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates, and that so long as they remain operative they are conclusive as to the rights of the parties, *in the absence of facts or circumstances showing an attempt at rebating or false billing.*"

In *National etc. v. A. & R. R. R. Co.*, 40 I. C. C. 354, the Commerce Commission says:

"To not correctly declare the value of an animal shipped in interstate transportation, when valuation affects the rate, is a violation of the act to regulate commerce."

Counsel for the shipper, and the Circuit Court of Appeals think the case of *Merchants etc. v. Ins. Co.*, 155 U. S. 368, a strong authority against our contention in this case. That case arose under matters happening in November, 1887, and while the original Commerce Act of 1887 was effective, and before important amendments to the Act were adopted.

The Present Law Prohibiting Rebating

The Commerce Act of February 4, 1887 (24 Stat. 379) attempted to prevent rebating by merely making it unlawful for the *carrier* to deviate from the published rates and charges. After two years of experience the original Act was amended on March 2,

1889 (25 Stat. 857), and the *shipper*, who *knowingly* and *willfully* obtained transportation at less than the regular rate, was made guilty of fraud. The amendment apparently did not reach the evil Congress was trying to prevent.

Hence on February 19, 1903 (32 Stat. 847—the Elkins Act), Congress made a radical change in the policy theretofore pursued on this subject. The purpose of the Act of February 19, 1903 was “to reach all means and methods by which the unlawful preference of rebate, concession, or discrimination is offered, granted, given, or received”; and was not limited to “the obtaining of such preferences by fraudulent schemes or devices, or to those operating only by *dishonest, underhanded* methods.” And “this Act is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered.”

Armour Packing Co. v. U. S., 209 U. S. 69;
U. S. v. Union Mfg. Co., 240 U. S. 610.

Under this new policy adopted by Congress and enforced by this Court, it is, we think, clear that Congress intended to allow neither shipper nor carrier to profit by a violation of the Commerce Act; and we respectfully insist that the supremacy of the law cannot be maintained if shippers are to be rewarded with recoveries far in excess of any amount of penalty the government may impose in a criminal action, and thus aid the shipper in obtaining the fruits of rebating, which not only affects the carrier,

but affects other shippers who obey the law, and for whose protection rebating was prohibited and made unlawful.

This question considered with or without the "Cummins Amendment" is an important one to shippers and carriers alike, and so long as the decision of this court in *Illinois Central R. Co. v. Mes-sina*, *Ibid.*, stands, we think shippers entering into unlawful contracts with a carrier, destroy their right to invoke the aid of the courts in the enforcement of rights growing out of such unlawful contracts. We do not think public policy is promoted by allowing some shippers, acting illegally, to recover damages for lost property, and thus allowing them to retain the benefits of rebating, to the disadvantage of other competing shippers who have obeyed the law.

The Act of February 19, 1903, made a radical change in the law on the subject of rebating, and prior decisions on different acts are not, we think, strict authority in construing this Act.

Obviously Congress could, if it so desired, reverse its policy and again impose penalties upon the carrier alone, and thus seek to prevent rebating and unjust discrimination. And if the "Cummins Amendment" stood alone—was not an amendment to the Commerce Act, and therefore to be read in connection with the other provisions of the Act, and in the light of the decisions of this Court, and the history and efforts of the Congress and the courts to suppress rebating and unjust discrimination—it might very well be said Congress had intended to place the entire burden of unlawful rebating upon the car-

riers, leaving the shippers free to induce carrier's agents to violate the tariffs and secure rebates and unjust discriminations, or else requiring the great army of carrier agents throughout the country to become expert appraisers of the value of property offered for transportation in interstate commerce.

But we think such a construction of a mere amendment to the Commerce Act is not permissible when we, as we must, read the "Cummins Amendment" as a part of the Commerce Act, and in the light of the history and efforts of Congress to suppress and prohibit rebating and unjust discrimination.

We insist that certainly the question presented is not a frivolous one, but challenges the serious consideration and mature judgment of this Court.

There are other questions which might be discussed,—especially the question of allowing oral evidence to vary the terms of the written contract so the shipper may profit by his violation of the law, but we think sufficient has been said to refute the charge "that said writ was taken for delay only or the questions on which the decision of this case depends are so frivolous as to not need further argument." When the case comes on for hearing in due course we will present an assignment of errors and a brief, in accordance with the rules of the Court.

Respectfully submitted,

MAXWELL & RAMSEY,

BASS & SIMS,

WILLIAM L. GRANBERY,

Attorneys.

Opinion of the Court.

ADAMS EXPRESS COMPANY *v.* DARDEN.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT.

No. 226. Argued April 22, 1924.—Decided May 26, 1924.

1. A judgment of the Circuit Court of Appeals in a case involving the liability of a carrier for injury to an interstate shipment under its tariff and shipping agreement and an act of Congress, *held* reviewable by writ of error and not by certiorari. P. 266.
2. The first "Cummins Amendment," (March 4, 1915, c. 176, 38 Stat. 1196,) made the carrier liable for the full actual loss of property shipped, when caused by the carrier, regardless of any agreement or representation of the shipper. *Id.*
So *held* where, without actual fraud, the value declared by the shipping contract on which the charge was based was much less than the actual value, and carried a lower tariff rate, and where the contract was on a form filed as part of the tariff and bore a notice that the true value must be declared.
286 Fed. 61, affirmed; certiorari denied.

ERROR to a judgment of the Circuit Court of Appeals affirming a recovery of damages in the District Court for loss of livestock in transit.

Mr. William L. Granbery for plaintiff in error.

Mr. K. T. McConnico, with whom *Mr. J. S. Laurent* and *Mr. Jno. A. Pitts* were on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The first Cummins Amendment (March 4, 1915, c. 176, 38 Stat. 1196, 1197) provides that a common carrier receiving property for transportation in interstate commerce "shall issue a receipt or bill of lading therefor"; shall be liable "for the full actual loss, damage, or injury to such

property [shipped] caused by it "; that " no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier . . . from the liability hereby imposed "; and that such liability for the full actual loss shall exist " notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void." The effect of this act is to nullify provisions limiting liability contained in public tariffs and in bills of lading. *Chicago, Milwaukee & St. Paul Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S. 97.

While this act of Congress was in force, Darden shipped six horses by Adams Express from Latonia, Kentucky, to Windsor, Ontario. Five of the horses were killed in transit. He brought this action to recover their value against that company in the federal court for the Middle District of Tennessee. The jury found that the accident was due to the carrier's negligence; and rendered a verdict for Darden in the sum of \$32,500. Judgment entered thereon was affirmed by the Circuit Court of Appeals. 286 Fed. 61. The case was brought here by writ of error under § 241 of the Judicial Code. A petition for a writ of certiorari was also filed; and consideration of it was postponed. The case is properly here on writ of error. Compare *Louisville & Nashville R. R. Co. v. Rice*, 247 U. S. 201. The petition for a writ of certiorari is, therefore, denied.

The company contends that a verdict for it should have been directed, or that the recovery should have been limited to \$500, by reason of the following facts: The tariff contained a provision requiring that the actual value of a shipment be declared; and also provided for an addi-

tional charge by way of a graduated percentage, if the value exceeded a stated amount. The tariff rate for shipping a carload of horses valued at \$100 each was \$165. This rate was named to Darden by the Express Company's agent; that amount was paid; and the company's so-called non-negotiable live-stock contract, prepared by it, recited that the value of the horses was declared by the shipper to be \$100 each. The horses were in fact race horses; and were of much greater value than the sum named. This fact was known to the company's agent. The copy of the shipping contract stating \$100 to be the declared value of each horse was not seen by Darden until after the accident had occurred. It was not contended that he was guilty of actual fraud in shipping at the rate named.

The main argument for the company appears to be this: The statute requires the shipper to disclose the "real value" of the shipment, and requires the carrier to collect the "real value" rate. Darden paid the rate which, by the tariff, was made applicable only to horses valued at not more than \$100 each. The shipping contract recited that the declared value of each horse was \$100. To that contract was attached a notice that the shipper "must state the actual value of the shipment, which value must be inserted in the contract." The form of this contract and notice were filed as part of the tariff. Darden was bound to know the provisions of the tariff. To recover he must sue on the shipping contract. By claiming actual value largely in excess of \$100, with a view to establishing liability therefor, he attempted not only to vary a written contract, but to secure, by means of a discriminatory rate, an illegal rebate. Thereby, he necessarily disclosed to the courts his unlawful conduct; and the court should refuse its aid, whether the action be deemed one upon an illegal contract or, more generally, a proceeding to enforce rights arising out of an illegal transaction.

The short answer to this, and to the company's other arguments, is furnished by the comprehensive terms of the statute. From them appears the intention of Congress to make the carrier liable for the full actual loss, regardless of any agreement or representation of the shipper. Its purpose is so accurately stated that discussion could not make it clearer. It might confuse. The enactment of the second Cummins Amendment, in the following year (Act of August 6, 1916, c. 301, 39 Stat. 441) indicates merely that the provisions of the 1915 Act proved to be more comprehensive than was found to be desirable.¹ Compare *American Railway Express Co. v. Lindenburg*, 260 U. S. 584.

Affirmed.

Certiorari denied.

MR. JUSTICE SANFORD took no part in the consideration or decision of this case.

¹ The 1916 Act excepts from the prohibition of limitation of liability "property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, etc." See *In the Matter of Express Rates, etc.*, 43 I. C. C. 510; *Live Stock Classification*, 47 I. C. C. 335; *J. B. Williams Co. v. Hartford & New York Transportation Co.*, 48 I. C. C. 269, 273; *Gold Hunter Mining Co. v. Director General*, 63 I. C. C. 234, 241; *Domestic Bill of Lading and Live Stock Contract*, 64 I. C. C. 357, 361; *U. S. Industrial Alcohol Co. v. Director General*, 68 I. C. C. 389, 391; *North Packing & Provision Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 69 I. C. C. 235, 237; 80 I. C. C. 737, 739.